IN THE

Supreme Court of the United States

October Term, 1976

No. 76-99

OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA,

Petitioner,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Statutes — Page

Page

Textbook

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Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit entered on May 11, 1976, in the above-entitled case.

Opinion Below.

The opinion of the Court of Appeals, not yet officially reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the Central District of California.[1]

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 11, 1976, and this petition

[1]The Findings of Fact and Conclusions of Law made and entered by the District Court appear at 12 FEP 1298 (1976); the Court of Appeals' Opinion follows at 12 FEP 1300 (1976).

for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

Questions Presented.

Whether there is no time limitation whatsoever applicable to the EEOC's right to sue under Title VII of the Civil Rights Act of 1964, as amended.

This question involves the following subsidiary quesions:

(1) Whether the most analogous state statute of limitations is applicable to the EEOC's right to sue to collect back pay for private individuals;

(2) Whether the most analogous state statute of limitations is applicable to the EEOC's right to sue to obtain injunctive relief; and

(3) Whether the EEOC's right to sue is governed by any federal statute of limitations.

Statutory Provision Involved.

Section 706(f)(1) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e *et seq.* (hereinafter "Title VII") provides in pertinent part:

> "[I]f within one hundred and eighty days from the filing of [a] charge . . . the Commission has not filed a civil action under this section . . . the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved. . . ."

Statement of the Case.

On December 27, 1970, Tamar Edelson filed a charge of discrimination against Occidental Life Insurance Company of California (hereinafter "Petitioner") with the Equal Employment Opportunity Commission (hereinafter the "EEOC") alleging that she had been discriminated against because of her sex. Her charge specified that "the most recent date on which this discrimination took place" was "October 1, 1970," the date of her discharge by Petitioner.

Although the EEOC acknowledged receipt of Ms. Edelson's charge on December 30, 1970, the EEOC did not formally file the charge until March 9, 1971. This was the only charge which Ms. Edelson ever filed against Petitioner, and the EEOC acknowledges that this is the charge upon which its entire complaint herein is based.

However, it was not until February 22, 1974—three years, four months, and 22 days after the occurrence of the single act of discrimination which Ms. Edelson had complained of—that the EEOC filed this complaint seeking back pay for numerous private individuals and injunctive relief. Accordingly, the District Court dismissed the EEOC's complaint upon the grounds that (1) Title VII imposed a 180-day federal statute of limitations on the EEOC's right to sue, and (2) alternatively, assuming that Title VII imposed no federal statute of limitations, the EEOC's suit was barred by the most analogous state statute of limitations.

On May 11, 1976, the Court of Appeals for the Ninth Circuit reversed on both grounds, holding that there was *no time limitation whatsoever* on the EEOC's right to sue. First, the Court found that the 180-day language of Title VII does not constitute a federal statute of limitations on the EEOC's right to sue, so that "there is simply no governing federal limitations period." (A. p. 5). Second, the Court refused to apply the most analogous state statute of limitations to the EEOC's right to sue.

It is to these two holdings that this Petition for Certiorari is directed, *particularly that aspect of the holding in which the Court expressly ruled contrary to two recent decisions of the Court of Appeals for the Fifth Circuit which held that the EEOC's right to recover back pay for private individuals is governed by the most analogous state statute of limitations.*

REASONS FOR GRANTING THE WRIT.

The Ninth Circuit's holding that the EEOC has an interminable right to sue to collect back pay for private individuals is in direct conflict with two recent decisions of the Fifth Circuit and contrary to numerous Supreme Court decisions which hold that the most analogous state statute of limitations should be applied in absence of an applicable federal statute of limitations, which rule has most recently been applied by the Supreme Court in a Civil Rights Act case in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975).

I.

The Ninth Circuit's Refusal to Apply the Most Analogous State Statute of Limitations to the Back Pay Aspect of the EEOC's Complaint Is in Irreconcilable Conflict With Two Recent Decisions of the Court of Appeals for the Fifth Circuit.

In *United States v. Georgia Power Co.*, 474 F.2d 906, 922-924 (5th Cir. 1973), the Fifth Circuit held that because there was no federal statute of limitations, the most analogous state statute of limitations was applicable to the back pay aspect of an employment discrimination suit brought by the United States Government under the Civil Rights Act of 1964. Thereafter, in *EEOC v. Griffin Wheel Co.*, 511 F.2d 456, 458 (5th Cir. 1975), affirmed on rehearing, 521 F.2d 223 (5th Cir. 1975), another three-judge panel of the Fifth Circuit held that the most analogous state statute of limitations was applicable to the back pay aspect of an employment discrimination suit brought by the EEOC under the Civil Rights Act of 1964.

The Sixth Circuit in dicta has expressed its agreement with *Georgia Power,*[2] and at least two district court decisions have reached the same result as *Griffin Wheel.*[3]

Nevertheless, the Ninth Circuit refused to apply the most analogous state statute of limitations to the back pay aspect of the EEOC complaint herein, finding instead that the EEOC's right to sue to recover back pay for private individuals was interminable. Expressly noting the contrary decisions of the Fifth Circuit, the Court stated, "We decline to follow its lead" (A. p. 11). The conflict between the Fifth and Ninth Circuits concerning the applicability of the most analogous state statute of limitations to the back pay aspect of an EEOC complaint is thus clear, unequivocal, and irreconcilable, and certiorari should be granted to resolve that issue.

II.

The Applicability of Federal and State Statutes of Limitation to the EEOC's Right to Sue Is of Critical, Pervasive, and Recurring Importance to the Judicial Administration of Title VII.

Over the years the EEOC will be the party-plaintiff in thousands of cases across the United States, many of which will involve EEOC efforts to recover back pay

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[2]In *United States v. Masonry Contractors Association of Memphis, Inc.,* 497 F.2d 871, 877 (6th Cir. 1974), the Sixth Circuit stated:

> "The appropriate statute of limitations for a Section 2000e-6 action [by the United States Government] is the limitation period prescribed by the state where the court sits for an action which seeks similar relief brought in a court in that state."

[3]*EEOC v. Eagle Iron Works,* 367 F.Supp. 817 (S.D. Iowa 1973), and *EEOC v. Christianberg Garment Co.,* 376 F.Supp. 1067, 1071-1073 (W.D. Va. 1974).

for private individuals. Furthermore, many of these EEOC complaints will undoubtedly be filed several years after the filing of the charge upon which these complaints are based.

Thus, whether any statute of limitations applies to EEOC complaints will be a constantly recurring issue, one which will continue to consume substantial time, energy, and resources of the federal courts and the litigants involved. Furthermore, litigation concerning such issues is certain to increase rather than to subside until this Court accepts review and definitively answers the question. Consequently, a prompt resolution is critical to a more effective utilization of limited federal court resources and a more expeditious resolution of EEOC complaints.

Furthermore, this Court has already resolved the statute of limitations issue with regard to employment discrimination suits brought by private individuals under the Civil Rights Act of 1866, holding in *Johnson v. Railway Express Agency, Inc.,* 421 U.S. 454 (1975), that the most analogous state statute of limitations is applicable to such suits. Accordingly, the most significant, recurring timeliness issue which remains in employment discrimination cases is whether the EEOC is also governed by some statute of limitations or whether its right to sue is interminable—the very issue presented by this Petition for Certiorari.

Finally, an early Supreme Court resolution of this issue is critical to fulfillment of the purposes behind Title VII. At the present time, the EEOC frequently takes several years simply to file its complaint in the federal court, apparently presupposing that its right to sue is interminable. If the EEOC is wrong in this belief—and there are compelling reasons set forth below

to believe that it is—its present practice of interminable delays clearly subverts the purpose of Title VII by preventing expeditious resolution of employment discrimination claims. If, however, such interminable delays are indeed what Congress intended, that should be established by Supreme Court decision, not administrative fiat, for the adverse effect of such delays is obvious.

III.

The Ninth Circuit Erred in Refusing to Apply the Federal or Most Analogous State Statute of Limitations to the EEOC's Right to Sue.

Four choices exist concerning the timeliness of EEOC complaints: (1) the EEOC's right to sue is governed by a federal statute of limitations, (2) the EEOC's right to sue is governed by the most analogous state statute of limitations, (3) the EEOC's right to sue to collect back pay for private individuals is governed by the most analogous state statute of limitations, or (4) the EEOC's right to sue is interminable. The Ninth Circuit concluded that the most extreme, fourth option—the interminable right to sue—was the one Congress intended. That conclusion is plainly in error.

With regard to the first option—the 180-day provision of Title VII as a federal statute of limitations—Petitioner presented 18 pages of argument and authority to the Ninth Circuit showing why that was Congress' intent, and Petitioner remains convinced that that conclusion has substantial merit. Petitioner also presented argument to the Ninth Circuit in support of the second option—that the EEOC's right to sue, not just its right to collect back pay for private individuals, is governed by the most analogous state statute of limitations. Because there is as yet no conflict among the circuits on the issues raised under either the first or second options, Petitioner will not summarize its arguments on these points at this time, focusing instead on the compelling reasons why the Ninth Circuit erred in refusing—contrary to the Fifth Circuit—to apply the most analogous state statute of limitations to the back pay aspect of the EEOC's complaint and holding that the EEOC has an interminable right to sue for back pay. However, if this Court grants the writ of certiorari concerning the applicability of state statutes of limitation to back pay claims asserted by the EEOC on behalf of private individuals, Petitioner submits that it would be advisable for this Court also to grant certiorari on the federal statute of limitations issue and the general state statute of limitations issue, thereby affording itself full consideration of all of the available options.

A. The Supreme Court and the Federal Courts Have, in the Absence of Any Applicable Federal Statute of Limitations, Repeatedly Applied the Most Analogous State Statute of Limitations to Complaints Brought Under Civil Rights Acts and Numerous Other Federal Statutes.

Many federal statutes contain no statute of limitations, and thus the Supreme Court has repeatedly held that suits filed under such statutes are governed by the most analogous state statute of limitations:

Civil Rights of 1866: Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 462 (1975);

Civil Rights Act of 1870: O'Sullivan v. Felix, 233 U.S. 318, 322-324 (1914);

Labor Management Relations Act: Autoworkers v. Hoosier Cardinal Corp., 383 U.S. 696, 701-705 (1966);

Sherman Antitrust Act: Chattanooga Foundry Co. v. Atlanta, 203 U.S. 390, 397 (1906);[4]

National Bank Act: Cope v. Anderson, 331 U.S., 461, 463 (1947); *Rawlings v. Ray*, 312 U.S. 96, 97-98 (1941); *Pufahl v. Estate of Parks*, 299 U.S. 217, 225 (1936);

Patent Act: Campbell v. Haverhill, 155 U.S. 610, 613-618 (1895);

Act of Feb. 26, 1845 (re custom duties): Barney v. Oelrichs, 138 U.S. 529, 530 (1891).

Similarly, the federal courts have applied state statutes of limitation to other federal statutes which contained no federal statute of limitations:

Civil Rights Act of 1964: United States v. Georgia Power Co., 474 F.2d 906, 923 (5th Cir. 1973); *EEOC v. Griffin Wheel Co.*, 511 F.2d 456, 458-459 (5th Cir. 1975);

Railway Labor Act: Jones v. Trans World Airlines, Inc., 495 F.2d 790, 799 (2nd Cir. 1974);

Labor Management Reporting and Disclosure Act of 1959: Sewell v. Grand Lodge of Intern. Ass'n of Machinists and Aerospace Workers, 445 F.2d 545, 548-549 (5th Cir. 1971), *cert. denied*, 404 U.S. 1024 (1972);

[4]A federal statute of limitations for suits brought under the antitrust laws was enacted by Congress in 1955. 15 U.S.C. Sections 15(b), 16.

Clayton Antitrust Act: Englander Motors Inc. v. Ford Motor Co., 293 F.2d 802, 804 (6th Cir. 1961); *Williamson v. Columbia Gas & Electric Corp.*, 27 F.Supp. 198 (D.Del. 1939), *affirmed*, 110 F.2d 15 (3rd Cir. 1939), *cert. denied*, 310 U.S. 639 (1940);

Securities Exchange Act of 1934: Richardson v. MacArthur, 451 F.2d 35, 39 (10th Cir. 1971); *Douglas v. Glen E. Hinton Investments, Inc.*, 440 F.2d 912, 914 (9th Cir. 1971); *Klein v. Bower*, 421 F.2d 338, 343 (2nd Cir. 1970); *Morgan v. Koch*, 419 F.2d 993, 996-997 (7th Cir. 1969),

Communications Act of 1934: Bufalino v. Michigan Bell Telephone Co., 404 F.2d 1203, 1208 (6th Cir. 1968), *cert. denied*, 394 U.S. 987 (1969);

Investment Company Act of 1940: Esplin v. Hirschi, 402 F.2d 94, 101 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969).

Thus, the rule that state statutes of limitation are applied where no federal statute of limitations exists is firmly embedded in our jurisprudence, and with good reason, the most basic of which stems from an elemental sense of due process, best summarized by Chief Justice John Marshall's statement in 1805 that an absence of some statute of limitations

> "would be utterly repugnant to the genius of our laws. In a country within which not even treason can be prosecuted after the lapse of three years, it can scarcely be supposed that an individual

would remain forever liable to a pecuniary forfeiture."

Adams v. Woods, 2 Cranch 336, 342 (1805).

Second, statutes of limitation are designed to protect both the courts and defendants from stale claims which depend upon evidence and witnesses the availability and reliability of which have been impaired by the passage of time. *E.g., Campbell v. Haverhill,* 155 U.S. 610, 617 (1895).

Third, given the well-established nature of the rule that state statutes of limitation will be applied in the absence of federal statutes of limitation, it is far more reasonable to assume that Congress intended that rule whenever a federal statute of limitations was omitted than it is to presume that Congress intended the right to sue to be interminable. Hill, *State Procedural Law in Federal Non-Diversity Litigation,* 69 Harv. L. Rev. 66, 78-81, 91-92 (1955), and cases cited therein.

Thus, where the refusal to apply the most analogous state statute of limitations means that the right to sue is interminable, only the most compelling reasons could justify that result, which Chief Justice John Marshall found "utterly repugnant to the genius of our laws." *Adams v. Woods,* 2 Cranch at 342. Were it otherwise, quite obviously defendants would be unfairly and prejudicially subjected to potentially massive and totally unknown financial liabilities.

B. The Supreme Court's Only Exception to the Rule Applying State Statutes of Limitation When No Federal Limitation Exists Has Been Where the United States Government Was Suing to Collect Revenue for the United States Treasury or to Prevent Injury to the United States Government.

The few Supreme Court decisions which refuse to apply the state statute of limitations to a suit by the United States Government invariably do so because the United States is suing as a sovereign to protect its rights as a sovereign, *i.e.,* to collect money for the United States Treasury or to prevent an injury to the United States Government itself. *E.g., United States v. Summerlin,* 310 U.S. 414 (1940) (United States attempting to enforce its claim against an estate); *United States v. Thompson,* 98 U.S. 486 (1879) (United States seeking recovery of funds embezzled from its Treasury); *United States v. Nashville, Chattanooga & St. Louis Railway Co.,* 118 U.S. 120 (1886) (United States suing to collect on bonds owned by the United States); *Davis v. Corona Coal Co.,* 265 U.S. 219 (1924) (United States suing to enforce claims which arose during United States' operation of railroads); *United States v. Dalles Military Road Co.,* 140 U.S. 599 (1891) (United States suing to recover land it had granted). However, whenever the United States Government has sued on behalf of private individuals, the Supreme Court has held that the most analogous state statute of limitations is applicable. *E.g., United States v. Beebe,* 127 U.S. 338 (1888); *Curtner v. United States,* 149 U.S. 662 (1893); *United States v. Des Moines Navigation & R. Co.,* 142 U.S. 510 (1892).

C. The Ninth Circuit's Reasons for Expanding This Limited "Sovereign Immunity" Exception to Include Suits Brought by a Governmental Agency to Recover Back Pay Claims for Private Individuals Are Not Persuasive.

No Supreme Court decision to date has ever found the United States Government or one of its agencies immune from the state statute of limitations where the government or agency was suing to collect money on behalf of private individuals. That, of course, is what the EEOC would have this Court hold for the first time. Yet neither of the reasons offered by the Ninth Circuit for such a substantial departure from Supreme Court precedent has merit.

1. *The Ninth Circuit's Argument That "Public Policy" Prevents Application of State Statutes of Limitation to EEOC Back Pay Claims.*

With no evident analysis of prior Supreme Court decisions or federal court decisions concerning the applicability of state statutes of limitation to government suits brought under other federal statutes, the Ninth Circuit concluded that because an award of back pay to private individuals in an employment discrimination case serves a "public interest," state statutes of limitation could not be applied to such suits. There are at least two compelling answers to that argument.

First, the decisions discussed above page 13 simply do not support the conclusion that a state statute of limitations is inapplicable whenever a "public interest" may be served by the lawsuit. Rather, the only exception to the state statute of limitations rule has heretofore been limited by the Supreme Court to suits where the United States Government is suing as the sovereign, seeking to protect its rights as the sovereign.

The exception is, in other words, simply a manifestation of the doctrine of sovereign immunity. It would be completely inconsistent with the trends of modern law suddenly to expand that doctrine of sovereign immunity to encompass government agency suits to collect money for private individuals.

Thus, prior Supreme Court decisions do not support the conclusion that a state statute of limitations is inapplicable whenever a "public interest" may be served by the lawsuit. Accordingly, this Court's recent comments in *Franks v. Bowman Transportation Co.*,[5] and *Albemarle Paper Company v. Moody*[6] concerning the public purpose served by awards in Title VII cases do not serve to bring such lawsuits, or at least back pay recovery thereunder, within any existing exception to the rule that state statutes of limitation are applied in the absence of federal statutes of limitation. Furthermore, as much could be said about a public purpose to be served by awards in suits under the Civil Rights Act of 1866, yet this Court in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975), applied a state statute of limitations to affirm the dismissal of such a cause of action, making clear that there is nothing "peculiar in a federal civil rights action which would justify special reluctance in applying state law." Therefore, the EEOC's right to sue is not entitled to any special exception simply because its suit is based on Title VII.

The second reason why that Ninth Circuit's "public policy" rationale for refusing to apply the state statute of limitations is erroneous is because, in fact, "public policy" and Congressional intent clearly *require* some

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[5].... U.S. ...., 44 U.S.L.W. 4356 (1976).
[6]422 U.S. 405 (1975).

time limitation on the EEOC's right to sue. Title VII is replete with short specific time deadlines designed to guarantee prompt handling of all employment discrimination charges.[7] This elaborate statutory procedure imposes strict time limitations on two parties to the process—the aggrieved party and the federal court. The issue here presented is whether Congress also intended the EEOC to operate within certain time limitations as well. In a statutory enforcement scheme that depends on all of the parties for success, it is inconceivable that Congress would have intended that only two of the parties—the aggrieved party and the federal court—be required to proceed expeditiously, particularly where the interminable delay of the third party—the EEOC— can effectively nullify any expeditious action by the other two parties.

Furthermore, with no time limitation, the EEOC has absolutely no incentive to expedite its handling of charges. The EEOC can—and obviously does—take as long as it wants to, doing a great disservice not only to aggrieved parties but to respondents as well. While the EEOC has an obvious administrative desire for an interminable period in which to file suit, what Congressional purpose behind Title VII is served by permitting—indeed, encouraging—such delay? Far from increasing compliance with the Act, such delays simply lessen the effectiveness of the EEOC and lessen the likelihood that truly aggrieved parties will turn to the EEOC for relief. Clearly, such delays impose

[7]See Sections 706(b), (e) and (f) of Title VII, as evidence of the Congressional insistence on prompt action and particularly the several onerous time demands and limitations imposed on the federal district courts, such as requiring the court to assign such cases for hearing "at the earliest practicable date," to cause such cases "to be in every way expedited," and "immediately to designate a judge . . . to hear and determine the case." Sections 706(b)(2) and (4).

upon respondents an unwarranted burden and a wholly unreasonable exposure to unknown and potentially massive financial liabilities.

In short, every aspect of Title VII envinces a Congressional conviction and insistence that the enforcement process move swiftly, for the benefit of the aggrieved persons and respondents and for the prompt realization of fair employment practices for all. "Public policy" thus requires prompt EEOC handling of charges, a result which will be assured only by applying a statute of limitations to such claims.

2. *The Ninth Circuit's Argument That the EEOC Should Be Treated the Same as the NLRB in This Respect.*

The second reason the Ninth Circuit offered for refusing to apply the state statute of limitations to the EEOC's complaint was its belief that the EEOC enforcement procedures are analogous to the NLRB enforcement procedures and thus should be treated the same with respect to state statutes of limitation. Yet even assuming that this Court were to conclude that state statutes of limitation are inapplicable to NLRB complaints—an issue not yet decided by this Court[8]—that conclusion cannot properly be extended

[8]Neither of the cases cited by the Ninth Circuit to support its conclusion that state statutes of limitation are inapplicable to NLRB complaints are Supreme Court decisions, and neither decision made that specific holding, for in neither case was the statute of limitations argument directed at the NLRB's delay in filing its complaint. For all that appears in either decision, the NLRB's complaint issued within a reasonable time after the charge was filed; rather, in each case the attack was directed at the NLRB's delay *after* its complaint had issued. Of course, statutes of limitation have always been directed at the timeliness of the filing of the complaint, not the pace of events thereafter. Therefore, while there is certainly dicta in both lower court decisions to support the conclusion that state statutes of limitation are inapplicable to the filing of NLRB complaints, neither case squarely so held.

to the EEOC, for the enforcement procedures of the two agencies are radically different.

The key distinction is that the EEOC must go to court and file its complaint in the federal district court before any legally cognizable adjudication occurs. By contrast, the NLRB never has to file a complaint in the federal district court as part of its normal enforcement procedure; rather, the NLRB issues its own complaint and the NLRB has been given full authority to function in lieu of, and in effect as, the federal district court. Thus, the only time the NLRB goes to federal court is to the appellate level.[9] Obviously, state statutes of limitation have never been thought to apply either to internal agency procedures or to appeals; they are applicable to the filing of a complaint in a court, an act which the EEOC must do and the NLRB need never do. There is, in short, simply no "complaint" that a statute of limitations could apply to insofar as the NLRB is concerned.

This critical distinction between the NLRB enforcement procedure and the EEOC enforcement procedure is all the more significant because it is the result of a deliberate Congressional decision to withhold from the EEOC the authority which the NLRB has always enjoyed. In both 1964 and in 1972, extensive efforts were made in Congress to give the EEOC full NLRB-type enforcement authority—and both efforts were rejected by Congress in favor of the present requirement that the EEOC initiate its enforcement efforts by the filing of a complaint in the federal district court. Thus, to hold the enforcement procedures of the two agencies

[9]The only exceptions are suits by the NLRB in federal district courts to obtain preliminary injunctive relief pending completion of the adjudicative process before the NLRB itself. 29 U.S.C. Sections 160(j) and (l).

to be analogous is to ignore the Congressional refusal to give the EEOC the same enforcement authority it has given the NLRB.

The Ninth Circuit's NLRB analogy is thus totally inapposite.

Conclusion.

In the final analysis, the decision of the Ninth Circuit giving the EEOC an interminable right to sue to collect back pay for private individuals will plainly frustrate the Congressional intent that discrimination cases be pursued expeditiously and will just as plainly prejudice respondents in the defense of such suits. In view of the fact that the holding of the Ninth Circuit on this issue is in direct conflict with decisions of the Fifth Circuit and in view of the fact that a definitive resolution of this issue is of enormous importance in employment discrimination cases, Petitioner respectfully submits that this Petition for Certiorari should be granted.

DATED: July 22, 1976.

Respectfully submitted,

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APPENDIX.

Opinion.

In the United States Court of Appeals, for the Ninth Circuit.

Equal Employment Opportunity Commission, Plaintiff-Appellant, v. Occidental Life Insurance Company of California, Defendant-Appellee. No. 75-1705.

Appeal from the United States District Court for the Central District of California.

Before: WRIGHT, KILKENNY and TRASK, Circuit Judges. WRIGHT, Circuit Judge:

In this Title VII action the Equal Employment Opportunity Commission (EEOC) appeals from the district court's order of dismissal. We reverse and remand.

I.

PROCEEDINGS BELOW

On December 27, 1970, Tamar Edelson filed with the EEOC a charge against Occidental Life Insurance Company (Occidental), alleging that she had been discriminated against because of her sex. She specified that "the most recent date on which this discrimination took place" was October 1, 1970, the date of her discharge by Occidental.

The EEOC referred the charge to the California Fair Employment Practices Commission, in accordance with the provisions of Section 706(c) [42 U.S.C. § 2000e-5(c)]. When that agency took no action, the charge was formally filed with the EEOC on March 9, 1971.

The EEOC undertook an investigation and, on February 25, 1972, its District Director issued Findings

of Fact that Occidental had discriminated against Ms. Edelson and also had discriminated against many other employees through a variety of practices and policies. Occidental filed exceptions to the findings on March 23, 1972. The EEOC issued its "Reasonable Cause" Determination on February 8, 1973 and during the following year, held a conciliation meeting with Occidental.

When that effort proved unsuccessful, the EEOC filed this action in district court on February 22, 1974.

That court granted Occidental's motion to dismiss, finding that:

1. The EEOC has no authority to file suit more than 180 days after the filing of the underlying charge, or where, as here, the charge was filed prior to the 1972 amendments to Title VII of the Civil Rights Act of 1964, more than 180 days after the effective date of such amendments;
2. Alternatively, the EEOC was barred from filing this suit by the California statute of limitations;
3. Alternatively, the EEOC was barred from proceeding on paragraphs 8(b) and 9(c) of its complaint because the allegations contained therein were outside the scope of the underlying charge; and
4. In any event, the EEOC was barred from seeking back pay for any alleged violations occurring more than two years prior to the filing of the underlying charge.

By its appeal herein, the EEOC challenges only the first three findings by the court.

We hold:

(1) The 180-day language of Section 706(f)(1) [42 U.S.C. § 2000e-5(f)(1)] does not constitute a limitation upon the EEOC's ability to sue in its own name;

(2) This action is not barred by any state by any state limitations period; and

(3) The EEOC properly included subparagraphs 8 (b) and 9(c) in its complaint.

II.

THE 180-DAY LANGUAGE OF SECTION 706 (f)(1)

Section 706(f)(1) [42 U.S.C. § 2000e-5(f)(1)] states in pertinent part:[1]

> . . . [I]f within one hundred and eighty days from the filing of such charge . . . the [EEOC] has not filed a civil action under this section . . . the [EEOC] . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the [EEOC], by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

The district court found that the above statute precluded the EEOC from bringing this action.

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[1]Before the 1972 amendment of Section 706(f)(1), the relevant time periods were 30 days for both the filing of the charge with the EEOC, and filing suit after receipt of a right-to-sue letter.

The statute on its face contains no express limitation upon suit *by the EEOC*. Rather, it precludes civil action by the charging party for 180 days so that the EEOC may during that period pursue conciliation.[2] If, after 180 days, the EEOC has neither filed a civil action nor achieved conciliation, the charging party may demand a "right-to-sue" letter. On receipt of it, the charging party has 90 days within which to sue. Should such private action be filed, the EEOC would apparently be restricted to intervention.[3]

However, should the person concerned choose not to sue during the allotted 90 days, the EEOC is not prohibited from suing thereafter. The statute in no way limits the time within which it must sue, so long as the charging party has not done so.[4]

This issue has been before the Courts of Appeals for the Third, Fourth, Fifth, Sixth, Eighth and Tenth Circuits. All have ruled that Section 706(f)(1) [42 U.S.C. § 2000e-5 (f)(1)] does not preclude suit by the EEOC after the 180-day period has run.[5]

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[2]The charging party may sue before the 180-day period has run if:

(a) The EEOC finds no reasonable cause during that time period [42 U.S.C. § 2000e-5(b)]; or

(b) The EEOC dismisses the charge during that time period [42 U.S.C. § 2000e-5(f)(1)].

[3]H.R. Rep. No. 92-238, 92nd Cong., 1st Sess. 12 (1971), 1972 U.S.C.C.A.N. 2148, *quoted in Equal Employment Opportunity Comm'n v. Duval Corp.*, 528 F.2d 945, 948 n.4 (10th Cir. 1976).

[4]The sole exception is that the EEOC must wait 30 days from the filing of the charge before filing suit. [42 U.S.C. § 2000e-5(f)(1)].

[5]*Equal Employment Opportunity Comm'n v. Duval Corp.*, 528 F.2d 945, 947 (10th Cir. 1976); *Equal Employment Opportunity Comm'n v. Meyer Bros. Drug Co.*, 521 F.2d 1364, 1365 (8th Cir. 1975); *Equal Employment Opportunity Comm'n v. E.I. duPont de Nemours and Co.*, 516 F.2d 1297 (3rd Cir. 1975); *Equal Employment Opportunity Comm'n v. Kimberley-Clark Corp.*, 511 F.2d 1352, 1356-59 (6th Cir. 1975); *Equal Employment Opportunity Comm'n v. Louisville and Nashville R.R.*, 505 F.2d 610 (5th Cir. 1974); *Equal Employment Opportunity Comm'n v. Cleveland Mills*, 502 F.2d 153 (4th Cir. 1974). *See also Equal Employment Opportunity Comm'n v. Local 41, Bartenders' International Union*, 369 F. Supp. 827, 829-31 (N.D. Cal. 1973).

Finding this avalanche of authority most persuasive, we adopt the rule that the 180-day language of Section 706(f)(1) does not constitute a limitation upon the EEOC's ability to sue in its own name. We conclude that the district court erred in barring this suit on the basis of the 180-day language in Section 706(f)(1).

III.
APPLICABILITY OF RELEVANT STATE LIMITATIONS PERIOD

The district court held alternatively that the EEOC suit was barred by the one-year California statute of limitations found in California Code of Civil Procedure §340(3).

We have already determined that Section 706(f)(1) [42 U.S.C. § 2000e-5(f)(1)] does not require the EEOC to file suit within 180 days of the date the private charge is filed with that agency. There being no other portion of Title VII susceptible of interpretation as a limitation on the time within which the EEOC must bring suit, we find that there is simply no governing federal limitations period. *See Equal Employment Opportunity Comm'n v. Griffin Wheel Co.*, 511 F.2d 456, 458, *aff'd on rehearing*, 521 F.2d 223 (5th Cir. 1975).

It is well established that in a *private* civil rights action, where Congress has not provided a statute of limitations, the state statute applied to similar liti-

gation will be applied to the federal action. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975), and cases cited therein; *Griffin v. Pacific Maritime Ass'n*, 478 F.2d 1118, 1119 (9th Cir. 1973).

In its complaint the EEOC seeks both injunctive relief and back pay. By its prayer for injunctive relief the EEOC promotes *public* policy and seeks to vindicate rights belonging to the United States as sovereign. Thus, the EEOC's request for injunctive relief is not subject to any state limitations period. *Griffin Wheel, supra,* 511 F.2d at 459; *Kimberly-Clark, supra,* 511 F.2d at 1359-60. *Cf. United States v. Summerlin,* 310 U.S. 414 (1940). The district court erred insofar as it barred EEOC's request for injunctive relief on the basis of the California limitations period.[6]

We consider the request for back pay. Occidental argues that, even though the EEOC is party plaintiff, "[i]nsofar as the . . . suit constitutes a proper legal conduit for the recovery of sums due individual citizens rather than the treasury, it is a private and not a public action." *United States v. Georgia Power,* 474 F.2d 906, 923 (5th Cir. 1973), *quoted in Griffin Wheel, supra,* 511 F.2d at 458.

Since we cannot agree that EEOC's request for back pay must be treated as "private" in nature, we believe the district court erred in applying the California limitations period to bar the back pay request.

Our starting point is the recent statement of the Supreme Court in *Franks v. Bowman Transp. Co.,* ..... U.S. ....., 44 USLW 4356 (Mar. 24, 1976):

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[6]We express no opinion as to which, if any, state limitations statute would apply had an individual or a class, rather than the EEOC, been party plaintiff.

"[C]laims under Title VII involve the vindication of a major public interest. . . .". *Id.* at ..... n.40, 44 USLW at 4365 n.40, *quoting* Section-By-Section Analysis, accompanying the Equal Employment Opportunity Act of 1972—Conference Report, 118 Cong. Rec. 7166, 7168 (1972).

The Court in *Albermarle Paper Co. v. Moody,* 422 U.S. 405 (1975), discussed in some detail the nature of Title VII claims for backpay:

> As the Court observed in *Griggs v. Duke Power Co.*, 401 U.S., at 429-430, the primary objective [of Title VII] was a prophylactic one:
>
> > "It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an indentifiable group of white employees over other employees."
>
> Backpay has an obvious connection with this purpose. If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." *United States v. N. L. Industries, Inc.*, 479 F.2d 354, 379 (CA8 1973).
>
> It is *also* the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination.

Id. at 417-18. (Emphasis added.)

That an award of back pay promotes the primary statutory objective of deterrence[7] was also noted by the Sixth Circuit in *Meadows v. Ford Motor Company*, 510 F.2d 939, 948 (6th Cir. 1975).

The *Moody* Court noted that "[t]he backpay provision [of Title VII] was expressly modeled on the backpay provision of the National Labor Relations Act." 422 U.S. at 419 and n.11. It is established doctrine that a back pay order under Section 10(c) of the National Labor Relations Act [29 U.S.C. § 160(c)] " 'is a reparation order designed to vindicate the public policy of the statute by making the employees whole for losses suffered on account of an unfair labor practice.' " *National Labor Relations Board v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1969), *quoting Nathanson v. National Labor Relations Board*, 344 U.S. 25, 27 (1952).

It is true, of course, that whenever a party obtains relief under a federal statute, public policy is vindicated even though direct, immediately cognizable benefits may flow only to the individual. Thus, for example, private action under Title 42 U.S.C. § 1981 is subject to state limitations periods despite the fact that each recovery may be said to promote the public policy embodied in the statute. *See Johnson, supra*, 421 U.S. 454 (1975).

But certain federal acts, such as the National Labor Relations Act, are intended to be broadly prophylactic

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[7]The Court in *Moody* stated that

> "backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy *and* making persons whole for injuries suffered through past discrimination."

422 U.S. at 421. (Emphasis added.)

as well as remedial. *See* Section 1 [29 U.S.C. § 151]. Several circuits, including our own, have recognized that back pay orders promote the prophylactic as well as the remedial purposes of the National Labor Relations Act.[8]

The National Labor Relations Board (NLRB) does not pursue the "adjudication of private rights." Rather, it "acts in a public capacity to give effect to the declared public policy of the Act. . . ." *National Licorice Co. v. National Labor Relations Board*, 309 U.S. 350, 362 (1940). "The fact that these proceedings [may] operate to confer an incidental benefit on private persons does not detract from this public purpose." *Nabors v. National Labor Relations Board*, 323 F.2d 686, 688-89 (5th Cir. 1963).

Accordingly, the NLRB, as an agency of the United States seeking enforcement of public rights, is not bound by state limitations statutes even when seeking back pay. *Nabors, supra*, at 688. *See also J. H. Rutter-Rex Mfg. Co. v. National Labor Relations Board*, 399 F.2d 356, 358, 362, 364 (5th Cir. 1968), *rev'd on other grounds*, 396 U.S. 258 (1969).[9]

The Civil Rights Act of 1964 grew out of Congressional awareness of the continued, pervasive discrimina-

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[8]*Marriott Corp. v. National Labor Relations Board*, 491 F.2d 367, 371 (9th Cir. 1974); *National Labor Relations Board v. United Marine Division, Local 33, National Maritime Union, AFL-CIO*, 417 F.2d 865, 868 (2nd Cir. 1969); *Trinity Valley Iron & Steel Co. v. National Labor Relations Board*, 410 F.2d 1161, 1168 (5th Cir. 1969); *Nabors v. National Labor Relations Board*, 323 F.2d 686, 688-89 (5th Cir. 1963).

[9]In *Rutter-Rex*, after ruling that state limitations statutes did not apply to the NLRB's action, the Fifth Circuit modified the Board's order because of inordinate administrative delay to the prejudice of defendant. The Supreme Court reversed and ordered enforcement of the back pay order in its entirety. In doing so, the Court assumed the inapplicability of state limitations periods.

tion against minorities, particularly Negroes, in voting, access to public facilities, public education and employment. As the Committee on the Judiciary of the House of Representatives reported:

> Considerable progress has been made in eliminating discrimination in many areas. . . . Nevertheless, in the last decade it has become increasingly clear that progress has been too slow and that national legislation is required to meet a national need which becomes ever more obvious. . . . [This Act] is designed as a step toward eradicating significant areas of discrimination on a nationwide basis. It is general in application and national in scope.

H. Rep. No. 914, 1964 U.S.C.C.A.N. 2391, 2393 (1964).

Thus, despite the existence in 1964 of such remedial statutes as the Civil Rights Acts of 1866, 1870 and 1871 [42 U.S.C. §§ 1981-88], Congress believed that some additional federal action was necessary to further the public objective of elimination of nationwide discrimination.[10] It decided that this objective could best be pursued by federal agency enforcement.

The original Section 706 of the Civil Rights Act of 1964, 78 Stat. 259-61, established an enforcement scheme to be implemented primarily by the EEOC. In 1972 Congress made it even more clear that "the vast majority of complaints will be handled through the offices of the EEOC or the Attorney General. . . ."

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[10]In *Johnson, supra,* the Court made clear the "separate, distinct and independent" remedies available under Title 42 U.S.C. § 1981 on the one hand, and Title VII on the other. 421 U.S. at 461.

Section-By-Section Analysis, *supra,* 118 Cong. Rec. at 7168.

The basic function of the EEOC, as with the NLRB, is to prevent and eliminate unlawful employment "practices and devices," primarily through "conference, conciliation, and persuasion." *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 44 (1974); Section 706(a) & (b) [42 U.S.C. § 2000e-5(a) & (b)]. The EEOC has the power to investigate, promote voluntary compliance, and bring suit upon failure of conciliation efforts.[11]

The EEOC vindicates public policy by suing in federal court, as does the NLRB by seeking enforcement of its orders in the courts of appeals. This is so regardless of the type of relief sought by either. As in labor law, so in Title VII law, the fact that private parties may benefit from public agency action does not detract from the public nature of those proceedings.

We are aware that the Fifth Circuit has reached a contrary result in at least two cases. *Griffin Wheel, supra,* 511 F.2d at 458-59; *Georgia Power, supra,* 474 F.2d at 922-23. We decline to follow its lead.

Both of those cases were decided before the Supreme Court decisions in *Moody, supra,* and *Franks, supra.* Moreover, the court in *Georgia Power,* 474 F.2d at 921, relied on the decision of the Supreme Court in *Rutter-Rex, supra,* but ignored the Court's statement therein that "back pay . . . is . . . designed to vindicate . . . public policy. . . ." 396 U.S. at 263.

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[11]Unlike the NLRB, the EEOC has no adjudicative powers. Yet the NLRB must itself seek court enforcement of its orders.

Occidental directs our attention to the Court's decision in *Johnson, supra*. The Court there held that a federal cause of action under Title 42 U.S.C. § 1981 was governed by "the most appropriate [limitation period] provided by state law." 421 U.S. at 462. However, *Johnson* involved a private claimant litigating under Section 1981, while this case involves a public agency enforcing Title VII rights.

Also, the *Johnson* Court did not qualify its holding according to the type of relief sought. Indeed, by discussing the availability under Section 1981 of "both equitable and legal relief," 421 U.S. at 460, the Court intimated that state limitations periods would apply to private actions brought under Section 1981, regardless of the type of relief sought.

Earlier in this opinion we joined the Fifth and Sixth Circuits, in *Griffin Wheel* and *Kimberly-Clark* respectively, in ruling that state limitations periods do not govern the EEOC's request for injunctive relief. Nothing in *Johnson* dictates a contrary conclusion. Similarly, *Johnson* does not preclude us from concluding that a request by the EEOC for back pay, in vindication of public policy, is likewise immune from state limitations[12] periods.[13]

There are sound practical considerations in support of our conclusion. First, subjecting the EEOC to state

[12]It appears that the EEOC would likewise be immune from the defense of laches. *Cf. United States v. Summerlin*, 310 U.S. 414, 416 (1940); *Nabors v. National Labor Relations Board*, 323 F.2d 686, 688 (5th Cir. 1963). *But see Griffin Wheel, supra*, 511 F.2d at 459 n.5; *Georgia Power, supra*, 474 F.2d at 923. However, since the issue was not raised herein, we need not address it.

[13]The court in *Kimberly-Clark* seemed to so conclude, although it did not make clear what type of relief was at issue. 511 F.2d at 1359-60.

limitations periods, often as short as one year,[14] would frustrate its attempts to resolve disputes by means of administrative "conference, conciliation, and persuasion," [42 U.S.C. § 2000e-5(b)], rather than by court action.[15]

Second, it would be cumbersome to determine the applicability of state limitations statutes according to the type of relief sought. As the Sixth Circuit stated in *Meadows, supra*, 510 F.2d at 945-46:

> "[Back pay] may not properly be viewed as a mere adjunct of some more basic equity. It is properly viewed as an integral part of the whole of relief which seeks not to punish the respondent but to compensate the victim of discrimination."

It is unreasonable to give the EEOC an open ticket for equitable relief, but to impose time constraints on back pay claims even though they are "an integral part of the whole of relief" sought.

Third, Section 706(g) [42 U.S.C. § 2000e-5(g)] provides: "Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission [EEOC]." Thus, an employer need not produce past employment records except for the period of time the charge is pending, and the preceding two years.

Finally, despite the absence of a controlling federal limitations period, at least two factors are at work

[14]*See, e.g., Johnson, supra*, 421 U.S. at 462 & n.7; *Griffin Wheel, supra*, 511 F.2d at 459.

[15]Clearly the cause of action "accrues" on the last date on which the allegedly unlawful act or practice occurs. *Collins v. United Airlines, Inc.*, 514 F.2d 594, 596 & n.2 (9th Cir. 1975); *Griffin Wheel, supra*, 511 F.2d at 459 n.6. *Cf. Johnson, supra*, 421 U.S. at 462.

to minimize EEOC dalliance. First, the charging party may demand a right-to-sue letter should the EEOC fail to obtain voluntary compliance or to sue within 180 days of the original filing. Section 706(f)(1) [42 U.S.C. § 2000e-5 (f)(1)]; *Johnson, supra,* 421 U.S. at 458. Second, in extreme cases a federal district court could compel agency action. *See* Sections 6(b) and 10e(A) of the Administrative Procedure Act [5 U.S.C. §§ 555(b), 706(1)]. *Cf. National Labor Relations Board v. J. H. Rutter-Rex Mfg. Co.,* 396 U.S. 258, 266 & n. 3 (1969) (dictum).

We conclude that the district court erred insofar as it barred the EEOC's back pay claim on the basis of the California limitations period.

IV.
SCOPE OF THE EEOC'S COMPLAINT

In her original charge filed with the EEOC, Ms. Edelson alleged that Occidental refused, on account of sex, to provide her with maternity leave, other pregnancy benefits, insurance, vacation benefits and seniority rights.

In the course of its investigation the EEOC discovered apparent discrimination against unmarried female employees in the distribution of "pregnancy-related benefits." It also discovered apparent discrimination against male employees in the administration of the retirement system. Although these forms of alleged discrimination were not mentioned in the original charge, the EEOC included them in subparagraphs 8(b) and 9(c) of its complaint. Occidental argued successfully below that these charges should be dismissed as being outside the scope of the original charge.

As amended in 1972, Section 710 of Title VII provides:

> For the purpose of all hearings and investigations conducted by the [EEOC] or its duly authorized agents or agencies, section 11 of the National Labor Relations Act (49 Stat. 455; 29 U.S.C. 161) shall apply.

[86 Stat. 109; 42 U.S.C. § 2000e-9]

While the investigation in this case preceded the 1972 amendment of Section 710, it is clear that the prior statute was similar in scope. *See Motorola, Inc. v. McLain,* 484 F.2d 1339, 1342-44 (7th Cir. 1973); *Graniteville Co. v. Equal Employment Opportunity Comm'n,* 438 F.2d 32, 39 (4th Cir. 1971).

Section 11(1) of the National Labor Relations Act [29 U.S.C. § 161(1)] provides in part that the NLRB may gain access to "any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question." This language was given a broad reach in *National Labor Relations Board v. Wyman-Gordon Co.,* 394 U.S. 759, 768 (1969).

Section 709(a) of Title VII [42 U.S.C. § 2000e-8(a)] today provides, as it did in 1964:

> In connection with any investigation of a charge filed under section 706, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this title and is relevant to the charge under investigation.

Had Occidental believed that the EEOC's investigation exceeded the permissible statutory scope, it could have refused the EEOC's demand for access and sought adjudication of its rights.[16] Occidental did not do so. Thus we can only conclude that the EEOC investigation was reasonable and that the information supporting the allegations in subparagraphs 8(b) and 9(c) was acquired during that reasonable investigation.

In *Equal Employment Opportunity Comm'n v. General Electric Co.*, ... F.2d ...., ... (4th Cir. Jan. 22, 1976), the Fourth Circuit held:

> *So long as* [*discovery of*] *the new discrimination arises out of the reasonable investigation of the charge filed,* it can be the subject of a "reasonable cause" determination, to be followed by an offer by the Commission of conciliation, and, if conciliation fails, by a civil suit, without the filing of a new charge on such claim of discrimination. In other words, the original charge is sufficient to support action by the EEOC as well as a civil suit under the Act for *any discrimination stated in the charge itself or* [*discovered*] *in the course of a reasonable investigation of that charge,* provided such discrimination was included in the reasonable cause determination of the EEOC and was followed by compliance with the conciliation procedures fixed in the Act.

(Emphasis in original.) *Accord, Equal Employment Opportunity Comm'n v. Huttig Sash & Door Co.*, 511 F.2d 453, 455 (5th Cir. 1975); *Equal Employment Opportunity Comm'n v. Kimberly-Clark Corp.*, 511 F.2d 1352, 1363 (6th Cir. 1975). We agree with the reasoning of the Fourth, Fifth and Sixth Circuits.[17]

[16] *See Local No. 104, Sheet Metal Workers International Ass'n v. Equal Employment Opportunity Comm'n,* 439 F.2d 237, 241-43 (9th Cir. 1971); *Circle K Corp. v. Equal Employment Opportunity Comm'n,* 501 F.2d 1052 (10th Cir. 1974); *Joslin Dry Goods Co. v. Equal Employment Opportunity Comm'n,* 483 F.2d 178 (10th Cir. 1973); *Motorola, Inc. v. McLain, supra; Graniteville Co., supra.*

In this case, Occidental received adequate notice during administrative investigation of the substance of the issues subsequently raised in subparagraphs 8(b) and 9(c) of the EEOC's complaint. Reference was made to those issues in both the District Director's Findings of Fact (February 25, 1972), and the EEOC's Determination of Reasonable Cause (February 8, 1973). Thus the EEOC complied with the statute by presenting these issues for conciliation. *See* Section 706(f)(1) [42 U.S.C. § 2000e-5(f)(1)].

We note that the EEOC itself could independently bring charges based upon the information it reasonably acquired during the investigation of Ms. Edelson's charge. *See* Section 706(b) [42 U.S.C. § 2000e-5(b)]. To require the EEOC to pursue that route, rather than allowing it to include the new charges along with the original one in a single Determination of Reasonable Cause, would be to champion form over substance and to generate "an inexcusable waste of

[17] In so agreeing we do not depart in any respect from our recent decision in *Oubichon v. North American Rockwell Corp.*, 482 F.2d 569 (9th Cir. 1973), in which we stated:

> "When an employee seeks judicial relief for incidents not listed in his original charge to the EEOC, the judicial complaint nevertheless may encompass any discrimination like or reasonably related to the allegations of the EEOC charge, including new acts occurring during the pendency of the charge before the EEOC."

Id. at 571.

Oubichon involved the complaint of a private party, he being subject to traditional notions of standing. We deal here with a complaint filed by a public agency seeking vindication of public rights.

valuable administrative resources" and "intolerable delay," in violation of statutory purpose. *General Electric, supra,* ..... F.2d at ....., 11 C.C.H.—Empl. Prac. Dec. at 6614.

It remains true that Ms. Edelson would not have had "standing" to charge Occidental with discrimination against unmarried female employees (Ms. Edelson was married), or against male employees with respect to retirement. However, as we have discussed earlier, the EEOC is charged with the vindication of public policy, not merely with the enforcement of private rights. In this case, enforcement by the EEOC of the objectives to Title VII should not be frustrated because a private charging party may not have had "standing" to make a particular claim.

Finally, it is argued that "amendment" by the EEOC of the original charge may operate to the detriment of the charging party. In this case such a result is speculative. In any case, the charging party should be able to intervene in either the administrative or judicial proceeding to insure that his or her rights are fully protected. *See* Section 706(f)(1) [42 U.S.C. § 2000e-5(f)(1)].

For the above reasons, we conclude that the district court erred in dismissing subparagraphs 8(b) and 9(c) of the EEOC's complaint.

V.
CONCLUSION

The judgment of the district court is reversed and the cause is remanded for further proceedings consistent with this opinion.

APPENDIX.

IN THE

Supreme Court of the United States

October Term, 1976
No. 76-99

OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA,

Petitioner,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR CERTIORARI FILED JULY 23, 1976.
CERTIORARI GRANTED DECEMBER 13, 1976.

APPENDIX

Chronological List of Relevant Docket Entries in Ninth Circuit.

January 31, 1975—EEOC Files Notice of Appeal of District Court Ruling

May 19, 1975—EEOC Brief Filed

June 30, 1975—Occidental Brief Filed

July 16, 1975—EEOC Reply Brief Filed

January 6, 1976—Oral Argument Held

May 11, 1976—Ninth Circuit's Opinion and Judgment Entered

CHARGE OF DISCRIMINATION

(If you have a complaint, fill in this form and mail it to the Equal Employment Opportunity Commission's Regional Office in your area. In most cases, a charge must be filed with the EEOC within a specified time after the discriminatory act took place. IT IS THEREFORE IMPORTANT TO FILE YOUR CHARGE AS SOON AS POSSIBLE.

(PLEASE PRINT OR TYPE)

This form is used only to file a charge of discrimination based on RACE, COLOR, RELIGION, SEX, or NATIONAL ORIGIN.

Date ... Case File No. [illegible]

1 Your Name (Mr., Mrs., Miss) TAMAR EDELSON Phone Number 552-1372

Street Address 167 DOLORES STREET

City SAN FRANCISCO State CALIFORNIA Zip Code 94103

2 WAS THE DISCRIMINATION BECAUSE OF: (Please check one)

Race or Color ☐ Religious Creed ☐ National Origin ☐ Sex ☑

3 Who discriminated against you? Give the name and address of the employer, labor organization, employment agency and/or apprenticeship committee. If more than one, list all.

Name OCCIDENTAL LIFE INSURANCE CO. of CALIFORNIA

Street address 433 CALIFORNIA STREET Room 600

City SAN FRANCISCO State CALIFORNIA Zip Code 94104

AND (other parties if any)

HOME OFFICE LOCATED AT OCCIDENTAL CENTER, LOS ANGELES, CA.
(P.O. BOX 1031, Terminal Annex,
Los Angeles, California)

4 Have you filed this charge with a state or local government agency? Yes ☐ When month day year No ☐

5 If your charge is against a company or a union, how many employees or members? Under 25 ☐ Over 25 ☑

6 The most recent date on which this discrimination took place: Month October Day 1 Year 1970

7 Explain what unfair thing was done to you. How were other persons treated differently? (Use extra sheet if necessary.)

Occidental Life Insurance Co. refused to grant me a maternity leave and instead suggested that I re-apply for my job with resultant loss of insurance and vacation benefits as well as seniority. I did not receive any pregnancy benefits as I had not worked in the company for 2 consecutive years. However, in the same situation the wife of a male employee would have received full coverage as male employees are eligible for these benefits after working for the company for only three months.

8 I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

Date 12/27/70 Tamar Edelson
(Sign your name)

Subscribed and sworn to before me this 27 day of December 1970

Notary Public
(Month, day, year)

It is relevant for you to get a Notary Public to sign this, sign your own name and mail to the Regional Office. The Commission will help you to get the form sworn to.

FORM APPROVED BUDGET BUREAU NO. 124 R0001 FORM OEO-5 (REV. 3-70)

Exhibit "A"

105

Affidavit of Dennis H. Vaughn in Support of Defendant's Motion for Summary Judgment.

United States District Court, Central District of California.

Equal Employment Opportunity Commission, Plaintiff, vs. Occidental Life Insurance Company of California, Defendant. Case No. CV 74-1698-AAH.

Filed: Nov. 8, 1974.

State of California, County of Los Angeles—ss.

Dennis H. Vaughn, being duly sworn, deposes and says:

I am a member of the law firm of Paul, Hastings, Janofsky & Walker, am duly admitted to practice before this Court, and am counsel of record for the Defendant in this case.

Attached hereto, marked as Exhibit "A", and incorporated herein by reference, is a true and correct copy of the Charge of Discrimination, dated December 27, 1970, filed with Plaintiff by the Charging Party herein, Tamar Edelson, against Defendant. In a telephone conversation on October 1, 1974, Jean Hagins, an attorney with the Equal Employment Opportunity Commission Litigation Center in San Francisco, California, advised affiant that said charge was received by Plaintiff on or about December 30, 1970 and was formally filed with Plaintiff on or about March 9, 1971.

The Findings of Fact on said charge, issued by the District Director of the Equal Employment Opportunity Commission on or about February 25, 1972, found that the Charging Party, Tamar Edelson, had

voluntarily terminated her employment with Defendant on or about September 9, 1971.

In a telephone conversation on September 3, 1974 with Elizabeth Leavey, an attorney with the Equal Employment Opportunity Commission Litigation Center in San Francisco, California, Ms. Leavey advised affiant that no notice of the type specified in Section 706(f)(1) of Title VII of the Civil Rights Act of 1964 was given by Plaintiff to the Charging Party herein, Tamar Edelson.

Dated: November 6, 1974.

/s/ Dennis H. Vaughn
Dennis H. Vaughn

Sworn to and subscribed before me this 6th day of November, 1974.

/s/ Irene Hansen
Notary Public in and for
said State and County

[Seal]

Affidavit of Jules H. Gordon in Support of Plaintiff Opposition to Defendants Motion for Summary Judgment or, in the Alternative Partial Summary Judgment.

In the United States District Court for the Central District of California.

Equal Employment Opportunity Commission, Plaintiff, v. Occidental Life Insurance Company of California, Defendant. Civil Action No. 74-1698 AAH.

Filed: Nov. 26, 1974.

Jules H. Gordon, being first duly sworn deposes and says:

1. I am an employee of the United States Government, Equal Employment Opportunity Commission, (hereinafter the Commission), serving as Associate Regional Attorney at the Commission's San Francisco Regional Litigation Center.

2. I have been employed by the Commission for more than 8 years and have previously served as Director of the Commission's San Francisco District Office out of which office this case arose.

3. By virtue of the employment stated above I am familiar with the administrative file relating to the charge of discrimination in violation of Title VII filed with the Commission against the Occidental Insurance Company of California by Tamar Edelson on March 9, 1971 (Charge Number TSF1-0634).

4. I have examined the files relating to Charge Number TSF1-0634 for the purpose of this affidavit; The file contains the following information.

A. Charge Number TSF1-0634 was filed with the San Francisco District Office of the Commis-

sion on March 9, 1971. At that time there were approximately 1000 charges pending investigation in that office which had about 8 investigators on its staff. Investigation was commenced by service of the charge on August 16, 1971.

B. On February 25, 1972 after the charge was investigated by the Commission a copy of the Commission's proposed Finding of Facts was sent to Occidental Insurance Company.

C. On March 23, 1972 Occidental responded to the Commission's proposed Finding of Facts stating its exceptions thereto.

D. On July 13, 1972 the Commission wrote Occidental inviting it to participate in pre-determination conciliation discussions. Occidental entered into such discussions and the issuance of a Commission Determination was stayed pending the outcome of the pre-determination conciliation efforts.

E. On October 20, 1972 these initial conciliation efforts were deemed unsuccessful.

F. On February 2, 1973 a letter of determination (See Exhibit 1 attached) was issued by the Commission which found reasonable cause as to the charge and as to other violations of Title VII so related to the charge as to be appropriate for determination under the regulations of the Commission.

G. Occidental was at that time invited to [sic] upon the Determination.

H. On February 26, 1973 Occidental responded to this invitation, expressing its interest in continuing discussions and informing the Commission that the matter had been referred to its law firm, Paul, Hastings, Janofsky, & Walker.

I. On March 20, 1973 Dennis Vaughn wrote the District Office's conciliator suggesting that further conciliation efforts should be with the Commission's General Counsel. (See letter, attachment 2)

J. On July 9, 1973, Mr. Vaughn and a number of officials of Occidental met with a Commission conciliator at the Commission's offices in San Francisco. According to the notes of the conciliator, at that time Mr. Vaughn requested that all conciliation efforts be suspended until a definitive ruling by the United States Supreme Court had been handed down which would be dispositive of the principal issues.

K. On September 13, 1973 after further correspondence with Occidental, the Commission concluded that conciliation efforts had failed and so notified Occidental.

L. On September 13, 1973 the conciliator informed the Charging Party Tamar Edelson that conciliation had failed and the Charging Party orally requested that the case be referred to the Commission's [sic]

5. There is no indication in the administrative file that Tamar Edelson ever requested or was denied the issuance of a "right to sue" letter relating to this charge.

6. There is nothing in the administrative file indicating that Occidental disputed the Commission's jurisdiction on the grounds of timeliness or asserted that the Commission's time to complete the administrative process had expired.

Dated: November 24, 1974

/s/ Jules H. Gordon
JULES H. GORDON

Sworn to and subscribed before me this 24 day of November 1974.

/s/ Erica Black Grubb
Notary Public
State of California
County of San Francisco

[Seal]

Complaint.

In the United States District Court for the Northern District of California.

Equal Employment Opportunity Commission, Plaintiff, vs. Occidental Life Insurance Company of California, Defendant. C 74 0427 ACW

JURISDICTION AND VENUE

Filed: February 22, 1974.

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sections 451, 1343, and 1345. This is an action authorized and instituted pursuant to Section 706(f) (1) and (3) and (g) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. Section 2000e *et seq.*, as amended, 42 U. S. C. Section 2000e *et seq.* (Supp II, 1972), hereinafter referred to as "Title VII."

2. The unlawful employment practices alleged below were and are now being committed within the State of California and the Northern Judicial District of California.

PARTIES

3. Plaintiff, Equal Employment Opportunity Commission, (hereinafter referred to as the "Commission"), is an agency of the United States of America charged with the administration, interpretation and enforcement of Title VII and is expressly authorized to bring this action under the provisions of Section 706(f) (1), 42 USC 2000e-5 (f) (1).

4. Since at least July 2, 1965, Defendant Occidental Life Insurance Company of California (hereinafter referred to as the "Defendant"), has continuously

been and is now a corporation doing business in San Francisco and elsewhere in California, where Defendant is engaged in the business of selling and servicing insurance policies across state lines, and has continuously and does now employ more than twenty-five employees.

5. Since at least July 2, 1965, Defendant has continuously been and is now an employer engaged in an industry affecting commerce within the meaning of Section 701(b), (g) and (h) of Title VII, 42 U.S.C. Section 2000e(b), (g) and (h).

STATEMENT OF CLAIM

6. On or about March 9, 1971 a charge was filed with the Commission alleging that Defendant had engaged in unlawful practices under Title VII.

7. The Commission, after investigating and finding reasonable cause to believe that Defendant had engaged in unlawful employment practices, has been unable, through informal methods of conference, conciliation and persuasion, to secure a conciliation agreement acceptable to it.

8. Since at least July 2, 1965 and continuously up until the present time Defendant has intentionally engaged in unlawful employment practices in violation of Section 703 of Title VII, including but not limited to the following:

(a) Defendant discriminates against women employees because of their sex by failing and refusing to treat pregnancy-related disabilities in the same manner

as other temporary disabilities, as exemplified by Defendant's policies and practices involving such matters as the availability, commencement and duration of leave, the accrual and retention or seniority and other benefits and privileges of employment, reinstatement and benefits available in connection with employment under the company's health insurance and sick leave benefits plans, as applied to pregnant employees.

(b) Defendant discriminates against women employees, because of their sex, by limiting pregnancy-related benefits under the Company's health insurance plan to married employees.

(c) Defendant discriminates against women employees because of their sex by maintaining discriminatory provisions in its health insurance and life insurance plans, both of which provide that where a husband and wife are both employees of Defendant, only the husband can provide coverage for their dependent children under such plans.

9. Since at least July 2, 1965 and continuously up until August of 1971, Defendant intentionally discriminated against individuals because of their sex in violation of Section 703 of Title VII, by

(a) providing pregnancy-related fringe benefits to wives of male employees under more favorable terms than to female employees, thereby discriminating against women employees because of their sex.

(b) denying regularly scheduled salary increases to women employees in accordance with Defendant's pol-

icy of requiring pregnant employees to terminate their employment at the end of a fixed number of months of their pregnancy, thereby discriminating against women employees because of their sex,

(c) limiting the option of early retirement to women employees, thereby discriminating against male employees because of their sex.

10. The effect of the policies and practices complained of in paragraphs 8 and 9 above has been to deprive individuals of equal employment opportunities and otherwise adversely effect [sic] their status as employees because of their sex.

PRAYER FOR RELIEF

WHEREFORE, the Commission respectfully prays that this Court:

A. Grant a permanent injunction enjoining Defendant, its officers, agents employees, successors, assigns and all persons in active concert or participation with it from engaging in any employment practice which discriminates because of sex.

B. Order Defendant to institute and carry out policies, practices and affirmative action programs which provide equal employment opportunities for individuals and which eradicate the effects of its past and present unlawful employment practices.

C. Order Defendant to make whole those persons adversely affected by the unlawful employment practices described above, by providing appropriate back pay, with interest, in an amount to be proved at trial and other affirmative relief necessary to eradicate the effects of its unlawful employment practices.

D. Grant such further relief as the Court deems necessary and proper.

E. Award the Commission its costs in this action.

Respectfully submitted,

WILLIAM A. CAREY
General Counsel

WILLIAM ROBINSON
Associate General Counsel

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First Amended Answer to Complaint.

United States District Court, Northern District of California.

Equal Employment Opportunity Commission, Plaintiff, vs. Occidental Life Insurance Company of California, Defendant. Civil Action No. C 74 0427 ACW.

Filed: May 8, 1974.

The Defendant, OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA, a corporation, answering Plaintiff's Complaint herein, admits, denies, and alleges as follows:

1. Answering Paragraph 1, Defendant denies generally and specifically each and all of the allegations therein contained.

2. Answering Paragraph 2, Defendant denies generally and specifically each and all of the allegations therein contained.

3. Answering Paragraph 3, Defendant admits that Plaintiff is an agency of the United States of America. Except as specifically so admitted, Defendant denies generally and specifically each and all of the remaining allegations contained in said paragraph.

4. Answering Paragraph 4, Defendant admits the allegations therein contained.

5. Answering Paragraph 5, Defendant admits the allegations therein contained.

6. Answering Paragraph 6, Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth thereof.

7. Answering Paragraph 7, Defendant admits that Plaintiff investigated a charge against Defendant filed with Plaintiff on or about March 9, 1971, that Plaintiff

issued a determination that there was reasonable cause to believe that said charge was true, that Plaintiff thereafter conferred with Defendant with respect to said charge, and that no Conciliation Agreement was agreed upon between Plaintiff and Defendant with respect to said charge. Except as specifically so admitted, Defendant denies generally and specifically each and all of the remaining allegations contained in said paragraph.

8. Answering Paragraph 8, Defendant denies generally and specifically each and all of the allegations therein contained.

9. Answering Paragraph 9, Defendant denies generally and specifically each and all of the allegations therein contained.

10. Answering Paragraph 10, Defendant denies generally and specifically each and all of the allegations therein contained.

FOR A FIRST, SEPARATE AND AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

11. The Complaint herein fails to state a claim upon which relief may be granted.

FOR A SECOND, SEPARATE AND AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

12. The Court has no jurisdiction of the subject matter of the Complaint herein.

FOR A THIRD, SEPARATE AND AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

13. The Complaint herein was not filed within the time limitations specified in Title VII of the Civil

Rights Act of 1964, as amended (42 U.S.C. §2000(e) et seq.).

FOR A FOURTH, SEPARATE AND AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

14. The Complaint herein fails to allege with specificity that Plaintiff has complied with all of the statutory prerequisites contained in Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §2000(e) et seq.) to the bringing of this action.

FOR A FIFTH, SEPARATE AND AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

15. Plaintiff has failed to comply with all of the statutory prerequisites contained in Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §2000(e) et seq.) to the bringing of this action.

FOR A SIXTH, SEPARATE AND AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

16. Plaintiff has failed to allege in its Complaint herein the basis of the original, underlying charge filed with it against Defendant upon which said Complaint is purportedly based.

FOR A SEVENTH, SEPARATE AND AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

17. The allegations contained in the Complaint herein are outside of the scope of the original, underlying charge filed with Plaintiff against Defendant and upon which said Complaint is purportedly based.

FOR AN EIGHTH, SEPARATE AND AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

18. Defendant's employment policies and insurance plans complained of in the Complaint herein constitute,

and/or are based upon, bona fide occupational qualifications under Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §2000(e) et seq.).

FOR A NINTH, SEPARATE AND AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

19. Defendant's employment policies and insurance plans complained of in the Complaint herein are based on and justified by business necessity.

FOR A TENTH, SEPARATE AND AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

20. Plaintiff has waived any right to bring this action by its prior entry into a Conciliation Agreement with Defendant wherein Plaintiff dropped certain of the allegations contained in the Complaint herein.

FOR AN ELEVENTH, SEPARATE AND AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

21. Plaintiff is estopped from bringing this action because of its prior entry into a Conciliation Agreement with Defendant wherein Plaintiff dropped certain of the allegations contained in the Complaint herein.

FOR A TWELFTH, SEPARATE AND AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

22. Plaintiff and Defendant have previously reached an accord and satisfaction concerning certain of the allegations asserted in the Complaint herein.

FOR A THIRTEENTH, SEPARATE AND AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

23. The acts and omissions complained of in the Complaint herein were done by Defendant, if at all,

in good faith and in conformity with, and in reliance upon, written interpretations and/or opinions of Plaintiff.

WHEREFORE, Defendant prays judgment as follows:

1. That the Complaint be dismissed;

2. That Plaintiff take nothing from its cause herein;

3. That Defendant be awarded its attorneys' fees pursuant to Section 706(k) of Title VII of the Civil Rights Act of 1964, amended;

4. That Defendant be awarded its costs of suit herein; and

5. For such further relief as the court may deem appropriate.

DATED: May 6, 1974

PAUL, HASTINGS, JANOFSKY
& WALKER
DENNIS H. VAUGHN
HOWARD C. HAY
/s/ By Dennis H. Vaughn
Dennis H. Vaughn
Attorneys for Defendant
Occidental Life Insurance
Company of California

Findings of Fact and Conclusions of Law (Rule 3(g) Local Rules of the Central District of California).

United States District Court, Central District of California.

Equal Employment Opportunity Commission, Plaintiff, vs. Occidental Life Insurance Company of California, Defendant. Case No. CV 74-1698-AAH.

Filed: Dec. 9, 1974.

This cause came on regularly for hearing on the Motion of Defendant OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA, for Summary Judgment, or in the alternative Partial Summary Judgment, on November 25, 1974, before the Court, the Honorable A. Andrew Hauk, Judge presiding. Paul, Hastings, Janofsky & Walker, by Dennis H. Vaughn, appeared as counsel for Defendant, and Jean A. Hagins appeared as counsel for Plaintiff. The Court having read the papers, and having heard the arguments propounded by the respective parties, and the cause having been submitted for decision, the Court being fully advised makes its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. This action is based on a charge of discrimination filed with the Equal Employment Opportunity Commission (hereinafter referred to as "Plaintiff" or "EEOC") on March 9, 1971 by a married female employee who allegedly had been terminated by Defendant on or about September 30, 1971. That charge alleged that the Charging Party had been denied benefits which were afforded by Defendant to male employees and further that the Charging Party had been terminated because of her pregnancy.

2. The Complaint herein was filed on February 22, 1974, in the Northern District of California, and by order of that Court, upon motion by Defendant, transferred to this Court pursuant to 28 U.S.C. §1404 (a) on May 29, 1974. The Complaint alleges, *inter alia*, acts of discrimination by Defendant against unmarried female employees, acts of discrimination by Defendant against male employees concerning retirement benefits, and acts of discrimination by Defendant which admittedly ceased in August 1971.

CONCLUSIONS OF LAW

1. Plaintiff instituted this action for alleged violations of Title VII of the Civil Rights Act of 1964, as amended. 42 U.S.C. §2000(e) *et seq.* (hereinafter referred to as "Title VII").

2. Defendant is an employer engaged in an industry affecting commerce within the meaning of Section 701 (b) of Title VII.

3. Plaintiff's action herein was instituted under Section 706(f)(1) of Title VII, which provides, in relevant part:

> . . . if within [180] days from the filing of such charge . . . the Commission has not filed a civil action under this section . . ., the Commission . . . shall so notify the person aggrieved and within [90] days from the giving of such notice a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved . . .

4. Section 706(f)(1) of Title VII requires the EEOC to institute court action within 180 days from the filing of the charge of discrimination sued upon,

or, in the case of charges pending at the time the EEOC was empowered to sue on its own by the 1972 amendments which became effective on March 24, 1972, within 180 days of March 24, 1972. *EEOC v. Cleveland Mills Company*, 364 F. Supp. 1235 (W.D. N.C. 1973), *rev'd*, 8 EPD ¶9602 (C.A. 4, 1974); *EEOC v. Louisville & Nashville Railroad Company*, 368 F. Supp. 633 (N.D. Ala. 1974); *EEOC v. Union Oil of California*, 369 F. Supp. 579 (N.D. Ala. 1974); *EEOC v. Griffin Wheel Company*, 7 EPD ¶9202, 7 FEP 484 (N.D. Ala. 1974); *EEOC v. Kimberly-Clark Corp.*, 7 EPD ¶9336, 7 FEP 666 (W.D. Tenn. 1974); *EEOC v. Berman Bros. Iron & Metal Co.*, 7 EPD §9212, 8 FEP 96 (N.D. Ala. 1974); *EEOC v. United States Pipe & Foundry Co.*, 8 EPD ¶9446, 7 FEP 977 (N.D. Ala. 1974); *EEOC v. General Dynamics Corp.*, 8 EPD ¶9724, 8 FEP 588 (N.D. Tex. 1974).

5. The Complaint herein was not filed until some 36 months after the filing of said charge of discrimination and some 23 months after March 24, 1972. Accordingly, this action is barred by the 180 day provision set forth in Section 706(f)(1) of Title VII.

6. Since this action is barred by the 180 day provision set forth in Section 706(f)(1) of Title VII, the Court lacks subject matter jurisdiction over this action.

7. Since this action is barred by the 180 day provision set forth in Section 706(f)(1) of Title VII, the Complaint fails to state a claim upon which relief can be granted against Defendant.

8. The California statute of limitations applicable to this action is California Code of Civil Procedure

Section 340(3), which sets forth a one year statute of limitations for such actions.

9. Since this action was not filed within one year after the alleged discrimination against, and termination of, the Charging Party took place, this action is barred by the California statute of limitations. *EEOC v. Union Oil of California,* 369 F. Supp. 579 (N.D. Ala. 1974).

10. Since this action is barred by the California statute of limitations, this Court has no subject matter jurisdiction over this action.

11. Since this action is barred by the California statute of limitations, the Complaint fails to state a claim upon which relief can be granted against Defendant.

12. The California statute of limitations also bars those violations alleged in paragraph 9 of the Complaint, all of which are alleged to have ceased two and a half years prior to the filing of this action.

13. Since the allegations of paragraph 9 of the Complaint are barred by the California statute of limitations, this Court lacks subject matter jurisdiction over the allegations set forth in paragraph 9 of the Complaint.

14. Since the allegations of paragraph 9 of the Complaint are barred by the California statute of limitations, said allegations fail to state a claim upon which relief can be granted against Defendant.

15. Paragraph 8(b) of the Complaint, alleging discrimination against unmarried female employees, and

paragraph 9(c) of the Complaint, alleging discrimination against male employees concerning retirement benefits, are outside the scope of the underlying charge herein and could not have been raised by the Charging Party, who could not possibly have personally been discriminated against by the aforesaid alleged discriminatory actions because she was a married female employee and thus has no "standing" to raise such allegations. Accordingly, the EEOC has no authority to institute court action concerning said allegations. *Sanchez v. Standard Brands, Inc.,* 431 F.2d 455 (C.A. 5, 1970); *King v. Georgia Power Co.,* 295 F. Supp. 943 (N.D. Ga. 1968); *EEOC v. General Electric Co.,* 376 F. Supp. 757 (W.D. Va. 1974); *Van Hoomissen v. Xerox Corp.,* 497 F.2d 180 (C.A. 9, 1974).

16. Since the EEOC has no authority to institute court action concerning the allegations contained in paragraphs 8(b) and 9(c) of the Complaint, this Court lacks subject matter jurisdiction over said allegations.

17. Since the EEOC has no authority to institute court action concerning the allegations contained in paragraphs 8(b) and 9(c) of the Complaint, said allegations fail to state a claim upon which relief can be granted against Defendant.

18. Section 706(g) of Title VII provides that back pay "shall not accrue from a date more than two years prior to the filing of a charge with the Commission."

19. The charge of discrimination herein was filed on March 9, 1971, yet the Complaint seeks back pay as far back as July 2, 1965.

20. Since the Complaint seeks back pay for a period more than two years prior to the filing of the charge of discrimination on March 9, 1971, the Complaint fails to state a claim upon which relief can be granted against Defendant with respect to back pay for any period prior to March 9, 1969.

21. There is no material issue of fact, and the facts show (a) that the entire Complaint herein is barred by the 180 day provision of Title VII, (b) the entire Complaint herein is barred by the California statute of limitations applicable to such actions, (c) paragraph 9 of said Complaint is barred by the California statute of limitations, (d) paragraphs 8(b) and 9(c) of said complaint are outside the scope of the underlying charge and thus the EEOC lacks authority to sue thereon, and (e) no back pay may be recovered for any period preceding March 9, 1969.

Dated: December 9, 1974.

/s/ A. Andrew Hauk,
United States District Judge

In the United States Court of Appeals, for the Ninth Circuit.

Equal Employment Opportunity Commission, Plaintiff-Appellant, v. Occidental Life Insurance Company of California, Defendant-Appellee. No. 75-1705.

Appeal from the United States District Court for the Central District of California.

Before: WRIGHT KILKENNY, and TRASK, Circuit Judges. WRIGHT, Circuit Judge:

In this Title VII action the Equal Employment Opportunity Commission (EEOC) appeals from the district court's order of dismissal. We reverse and remand.

I.
PROCEEDINGS BELOW

On December 27, 1970, Tamar Edelson filed with the EEOC a charge against Occidental Life Insurance Company (Occidental), alleging that she had been discriminated against because of her sex. She specified that "the most recent date on which this discrimination took place" was October 1, 1970, the date of her discharge by Occidental.

The EEOC referred the charge to the California Fair Employment Practices Commission, in accordance with the provisions of Section 706(c) [42 U.S.C. § 2000e-5(c)]. When that agency took no action, the charge was formally filed with the EEOC on March 9, 1971.

The EEOC undertook an investigation and, on February 25, 1972, its District Director issued Findings of Fact that Occidental had discriminated against Ms. Edelson and also had discriminated against many other

employees through a variety of practices and policies. Occidental filed exceptions to the findings on March 23, 1972. The EEOC issued its "Reasonable Cause" Determination on February 8, 1973 and during the following year, held a conciliation meeting with Occidental.

When that effort proved unsuccessful, the EEOC filed this action in district court on February 22, 1974.

That court granted Occidental's motion to dismiss, finding that:

1. The EEOC has no authority to file suit more than 180 days after the filing of the underlying charge, or where, as here, the charge was filed prior to the 1972 amendments to Title VII of the Civil Rights Act of 1964, more than 180 days after the effective date of such amendments;
2. Alternatively, the EEOC was barred from filing this suit by the California statute of limitations;
3. Alternatively, the EEOC was barred from proceeding on paragraphs 8(b) and 9(c) of its complaint because the allegations contained therein were outside the scope of the underlying charge; and
4. In any event, the EEOC was barred from seeking back pay for any alleged violations occurring more than two years prior to the filing of the underlying charge.

By its appeal herein, the EEOC challenges only the first three findings by the court.

We hold:

(1) The 180-day language of Section 706(f)(1) [42 U.S.C. § 2000e-5(f)(1)] does not constitute a limitation upon the EEOC's ability to sue in its own name;

(2) This action is not barred by any state limitations period; and

(3) The EEOC properly included subparagraphs 8(b) and 9(c) in its complaint.

II.
THE 180-DAY LANGUAGE OF SECTION 706 (f)(1)

Section 706(f)(1) [42 U.S.C. § 2000e-5(f)(1)] states in pertinent part:[1]

> . . . [I]f within one hundred and eighty days from the filing of such charge . . . the [EEOC] has not filed a civil action under this section . . . the [EEOC] . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the [EEOC], by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

The district court found that the above statute precluded the EEOC from bringing this action.

The statute on its face contains no express limitation upon suit *by the EEOC*. Rather, it precludes civil

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[1]Before the 1972 amendment of Section 706(f)(1), the relevant time periods were 30 days for both the filing of the charge with the EEOC, and filing suit after receipt of a right-to-sue letter.

action by the charging party for 180 days so that the EEOC may during that period pursue conciliation.[2] If, after 180 days, the EEOC has neither filed a civil action nor achieved conciliation, the charging party may demand a "right-to-sue" letter. On receipt of it, the charging party has 90 days within which to sue. Should such private action be filed, the EEOC would apparently be restricted to intervention.[3]

However, should the person concerned choose not to sue during the allotted 90 days, the EEOC is not prohibited from suing thereafter. The statute in no way limits the time within which it must sue, so long as the charging party has not done so.[4]

This issue has been before the Courts of Appeals for the Third, Fourth, Fifth, Sixth, Eighth and Tenth Circuits. All have ruled that Section 706(f)(1) [42 U.S.C. § 2000e-5(f)(1)] does not preclude suit by the EEOC after the 180-day period has run.[5]

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[2]The charging party may sue before the 180-day period has run if:

(a) The EEOC finds no reasonable cause during that time period [42 U.S.C. § 2000e-5(b)]; or

(b) The EEOC dismisses the charge during that time period [42 U.S.C. § 2000e-5(f)(1)].

[3]H.R. Rep. No. 92-238, 92nd Cong., 1st Sess. 12 (1971), 1972 U.S.C.C.A.N. 2148, *quoted in Equal Employment Opportunity Comm'n v. Duval Corp.*, 528 F.2d 945, 948 n. 4 (10th Cir. 1976).

[4]The sole exception is that the EEOC must wait 30 days from the filing of the charge before filing suit. [42 U.S.C. § 2000e-5(f)(1)].

[5]*Equal Employment Opportunity Comm'n v. Duval Corp.*, 528 F.2d 945, 947 (10th Cir. 1976); *Equal Employment Opportunity Comm'n v. Meyer Bros. Drug Co.*, 521 F.2d 1364, 1365 (8th Cir. 1975); *Equal Employment Opportunity Comm'n v. E.I. duPont de Nemours and Co.*, 516 F.2d 1297 (3rd Cir. 1975); *Equal Employment Opportunity Comm'n v. Kimberly-Clark Corp.*, 511 F.2d 1352, 1356-59 (6th Cir. 1975); *Equal Employment Opportunity Comm'n v. Louisville and Nashville R.R.*, 505 F.2d 610 (5th Cir. 1974); *Equal Employment Opportunity Comm'n v. Cleveland Mills*, 502 F.2d 153 (4th Cir. 1974). *See also Equal Employment Opportunity Comm'n v. Local 41, Bartenders' International Union*, 369 F. Supp. 827, 829-31 (N.D. Cal. 1973).

Finding this avalanche of authority most persuasive, we adopt the rule that the 180-day language of Section 706(f)(1) does not constitute a limitation upon the EEOC's ability to sue in its own name. We conclude that the district court erred in barring this suit on the basis of the 180-day language in Section 706(f)(1).

III.
APPLICABILITY OF RELEVANT STATE LIMITATIONS PERIOD

The district court held alternatively that the EEOC suit was barred by the one-year California statute of limitations found in California Code of Civil Procedure §340(3).

We have already determined that Section 706(f)(1) [42 U.S.C. § 2000e-5(f)(1)] does not require the EEOC to file suit within 180 days of the date the private charge is filed with that agency. There being no other portion of Title VII susceptible of interpretation as a limitation on the time within which the EEOC must bring suit, we find that there is simply no governing federal limitations period. *See Equal Employment Opportunity Comm'n v. Griffin Wheel Co.*, 511 F.2d 456, 458, *aff'd on rehearing*, 521 F.2d 223, (5th Cir. 1975).

It is well established that in a *private* civil rights action, where Congress has not provided a statute of limitations, the state statute applied to similar liti-

gation will be applied to the federal action. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975), and cases cited therein; *Griffin v. Pacific Maritime Ass'n*, 478 F.2d 1118, 1119 (9th Cir. 1973).

In its complaint the EEOC seeks both injunctive relief and back pay. By its prayer for injunctive relief the EEOC promotes *public* policy and seeks to vindicate rights belonging to the United States as sovereign. Thus, the EEOC's request for injunctive relief is not subject to any state limitations period. *Griffin Wheel, supra*, 511 F.2d at 459; *Kimberly-Clark, supra*, 511 F.2d at 1359-60. *Cf. United States v. Summerlin*, 310 U.S. 414 (1940). The district court erred insofar as it barred EEOC's request for injunctive relief on the basis of the California limitations period.[6]

We consider the request for back pay. Occidental argues that, even though the EEOC is party plaintiff, "[i]nsofar as the . . . suit constitutes a proper legal conduit for the recovery of sums due individual citizens rather than the treasury, it is a private and not a public action." *United States v. Georgia Power*, 474 F.2d 906, 923 (5th Cir. 1973), *quoted in Griffin Wheel, supra*, 511 F.2d at 458.

Since we cannot agree that EEOC's request for back pay must be treated as "private" in nature, we believe the district court erred in applying the California limitations period to bar the back pay request.

Our starting point is the recent statement of the Supreme Court in *Franks v. Bowman Transp. Co.*, ... U.S. ...., 44 USLW 4356 (Mar. 24, 1976): "[C]laims

[6]We express no opinion as to which, if any, state limitations statute would apply had an individual or a class, rather than the EEOC, been party plaintiff.

under Title VII involve the vindication of a major public interest. . . ." *Id.* at ..... n.40, 44 USLW at 4365 n.40, *quoting* Section-By-Section Analysis, accompanying the Equal Employment Opportunity Act of 1972—Conference Report, 118 Cong. Rec. 7166, 7168 (1972).

The Court in *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975), discussed in some detail the nature of Title VII claims for backpay:

> As the Court observed in *Griggs v. Duke Power Co.*, 401 U.S., at 429-430, the primary objective [of Title VII] was a prophylactic one:
>
> > "It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an indentifiable group of white employees over other employees."
>
> Backpay has an obvious connection with this purpose. If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." *United States v. N. L. Industries, Inc.*, 479 F.2d 354, 379 (CA8 1973).
>
> It is *also* the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination.

Id. at 417-18. (Emphasis added.)

That an award of back pay promotes the primary statutory objective of deterrence[7] was also noted by the Sixth Circuit in *Meadows v. Ford Motor Company*, 510 F.2d 939, 948 (6th Cir. 1975).

The *Moody* Court noted that "[t]he backpay provision [of Title VII] was expressly modeled on the backpay provision of the National Labor Relations Act." 422 U.S. at 419 and n.11. It is established doctrine that a back pay order under Section 10(c) of the National Labor Relations Act [29 U.S.C. § 160(c)] " 'is a reparation order designed to vindicate the public policy of the statute by making the employees whole for losses suffered on account of an unfair labor practice.' " *National Labor Relations Board v. J. H. Rutter-Rex. Mfg. Co.*, 396 U.S. 258, 263 (1969), *quoting Nathanson v. National Labor Relations Board*, 344 U.S. 25, 27 (1952).

It is true, of course, that whenever a party obtains relief under a federal statute, public policy is vindicated even though direct, immediately cognizable benefits may flow only to the individual. Thus, for example, a private action under Title 42 U.S.C. § 1981 is subject to state limitations periods despite the fact that such recovery may be said to promote the public policy embodied in the statute. *See Johnson, supra,* 421 U.S. 454 (1975).

But certain federal acts, such as the National Labor Relations Act, are intended to be broadly prophylactic

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[7]The Court in *Moody* stated that

> "backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy *and* making persons whole for injuries suffered through past discrimination."

422 U.S. at 421. (Emphasis added.)

as well as remedial. *See* Section 1 [29 U.S.C. § 151]. Several circuits, including our own, have recognized that back pay orders promote the prophylactic as well as the remedial purposes of the National Labor Relations Act.[8]

The National Labor Relations Board (NLRB) does not pursue the "adjudication of private rights." Rather, it "acts in a public capacity to give effect to the declared public policy of the Act. . . ." *National Licorice Co. v. National Labor Relations Board,* 309 U.S. 350, 362 (1940). "The fact that these proceedings [may] operate to confer an incidental benefit on private persons does not detract from this public purpose." *Nabors v. National Labor Relations Board,* 323 F.2d 686, 688-89 (5th Cir. 1963).

Accordingly, the NLRB, as an agency of the United States seeking enforcement of public rights, is not bound by state limitations statutes even when seeking back pay. *Nabors, supra,* at 688. *See also J. H. Rutter-Rex Mfg. Co. v. National Labor Relations Board,* 399 F.2d 356, 358, 362, 364 (5th Cir. 1968), *rev'd on other grounds,* 396 U.S. 258 (1969).[9]

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[8]*Marriott Corp. v. National Labor Relations Board,* 491 F.2d 367, 371 (9th Cir. 1974); *National Labor Relations Board v. United Marine Division, Local 33, National Maritime Union, AFL-CIO,* 417 F.2d 865, 868 (2nd Cir. 1969); *Trinity Valley Iron & Steel Co. v. National Labor Relations Board,* 410 F.2d 1161, 1168 (5th Cir. 1969); *Nabors v. National Labor Relations Board,* 323 F.2d 686, 688-89 (5th Cir. 1963).

[9]In *Rutter-Rex,* after ruling that state limitations statutes did not apply to the NLRB's action, the Fifth Circuit modified the Board's order because of inordinate administrative delay to the prejudice of defendant. The Supreme Court reversed and ordered enforcement of the back pay order in its entirety. In doing so, the Court assumed the inapplicability of state limitations periods.

The Civil Rights Act of 1964 grew out of Congressional awareness of the continued, pervasive discrimination against minorities, particularly Negroes, in voting, access to public facilities, public education and employment. As the Committee on the Judiciary of the House of Representatives reported:

> Considerable progress has been made in eliminating discrimination in many areas. . . . Nevertheless, in the last decade it has become increasingly clear that progress has been too slow and that national legislation is required to meet a national need which becomes ever more obvious. . . . [This Act] is designed as a step toward eradicating significant areas of discrimination on a nationwide basis. It is general in application and national in scope.

H. Rep. No. 914, 1964 U.S.C.C.A.N. 2391, 2393 (1964).

Thus, despite the existence in 1964 of such remedial statutes as the Civil Rights Acts of 1866, 1870 and 1871 [42 U.S.C. §§ 1981-88], Congress believed that some additional federal action was necessary to further the public objective of elimination of nationwide discrimination.[10] It decided that this objective could best be pursued by federal agency enforcement.

The original Section 706 of the Civil Rights Act of 1964, 78 Stat. 259-61, established an enforcement scheme to be implemented primarily by the EEOC. In 1972 Congress made it even more clear that "the

[10]In *Johnson, supra,* the Court made clear the "separate, distinct and independent" remedies available under Title 42 U.S.C. § 1981 on the one hand, and Title VII on the other. 421 U.S. at 461.

vast majority of complaints will be handled through the offices of the EEOC or the Attorney General. . . ." Section-By-Section Analysis, *supra,* 118 Cong. Rec. at 7168.

The basic function of the EEOC, as with the NLRB, is to prevent and eliminate unlawful employment "practices and devices," primarily through "conference, conciliation, and persuasion." *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 44 (1974); Section 706(a) & (b) [42 U.S.C. § 2000e-5(a) & (b)]. The EEOC has the power to investigate, promote voluntary compliance, and bring suit upon failure of conciliation efforts.[11]

The EEOC vindicates public policy by suing in federal court, as does the NLRB by seeking enforcement of its orders in the courts of appeals. This is so regardless of the type of relief sought by either. As in labor law, so in Title VII law, the fact that private parties may benefit from public agency action does not detract from the public nature of those proceedings.

We are aware that the Fifth Circuit has reached a contrary result in at least two cases. *Griffin Wheel, supra,* 511 F.2d at 458-59; *Georgia Power, supra,* 474 F.2d at 922-23. We decline to follow its lead.

Both of those cases were decided before the Supreme Court decisions in *Moody, supra,* and *Franks, supra.* Moreover, the court in *Georgia Power,* 474 F.2d at 921, relied on the decision of the Supreme Court in *Rutter-Rex, supra,* but ignored the Court's statement therein that "back pay . . . is . . . designed to vindicate . . . public policy. . . ." 396 U.S. at 263.

[11]Unlike the NLRB, the EEOC has no adjudicative powers. Yet the NLRB must itself seek court enforcement of its orders.

Occidental directs our attention to the Court's decision in *Johnson, supra*. The Court there held that a federal cause of action under Title 42 U.S.C. § 1981 was governed by "the most appropriate [limitation period] provided by state law." 421 U.S. at 462. However, *Johnson* involved a private claimant litigating under Section 1981, while this case involves a public agency enforcing Title VII rights.

Also, the *Johnson* Court did not qualify its holding according to the type of relief sought. Indeed, by discussing the availability under Section 1981 of "both equitable and legal relief," 421 U.S. at 460, the Court intimated that state limitations periods would apply to private actions brought under Section 1981, regardless of the type of relief sought.

Earlier in this opinion we joined the Fifth and Sixth Circuits, in *Griffin Wheel* and *Kimberly-Clark* respectively, in ruling that state limitations periods do not govern the EEOC's request for injunctive relief. Nothing in *Johnson* dictates a contrary conclusion. Similarly, *Johnson* does not preclude us from concluding that a request by the EEOC for back pay, in vindication of public policy, is likewise immune from state limitations[12] periods.[13]

There are sound practical considerations in support of our conclusion. First, subjecting the EEOC to state

[12]It appears that the EEOC would likewise be immune from the defense of laches. *Cf. United States v. Summerlin*, 310 U.S. 414, 416 (1940); *Nabors v. National Labor Relations Board*, 323 F.2d 686, 688 (5th Cir. 1963). *But see Griffin Wheel, supra*, 511 F.2d at 459 n.5; *Georgia Power, supra*, 474 F.2d at 923. However, since the issue was not raised herein, we need not address it.

[13]The court in *Kimberly-Clark* seemed to so conclude, although it did not make clear what type of relief was at issue. 511 F.2d at 1359-60.

limitations periods, often as short as one year,[14] would frustrate its attempts to resolve disputes by means of administrative "conference, conciliation, and persuasion," [42 U.S.C. § 2000e-5(b)], rather than by court action.[15]

Second, it would be cumbersome to determine the applicability of state limitations statutes according to the type of relief sought. As the Sixth Circuit stated in *Meadows, supra*, 510 F.2d at 945-46:

> "[Back pay] may not properly be viewed as a mere adjunct of some more basic equity. It is properly viewed as an integral part of the whole of relief which seeks not to punish the respondent but to compensate the victim of discrimination."

It is unreasonable to give the EEOC an open ticket for equitable relief, but to impose time constraints on back pay claims even though they are "an integral part of the whole of relief" sought.

Third, Section 706(g) [42 U.S.C. § 2000e-5(g)] provides: "Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission [EEOC]." Thus, an employer need not produce past employment records except for the period of time the charge is pending, and the preceding two years.

Finally, despite the absence of a controlling federal limitations period, at least two factors are at work

[14]*See, e.g., Johnson, supra*, 421 U.S. at 462 & n.7; *Griffin Wheel, supra*, 511 F.2d at 459.

[15]Clearly the cause of action "accrues" on the last date on which the allegedly unlawful act or practice occurs. *Collins v. United Airlines, Inc.*, 514 F.2d 594, 596 & n.2 (9th Cir. 1975); *Griffin Wheel, supra*, 511 F.2d at 459 n.6. *Cf. Johnson, supra*, 421 U.S. at 462.

to minimize EEOC dalliance. First, the charging party may demand a right-to-sue letter should the EEOC fail to obtain voluntary compliance or to sue within 180 days of the original filing. Section 706(f)(1) [42 U.S.C. § 2000e-5(f)(1)]; *Johnson, supra,* 421 U.S. at 458. Second, in extreme cases a federal district court could compel agency action. *See* Sections 6(b) and 10e(A) of the Administrative Procedure Act [5 U.S.C. §§ 555(b), 706(1)]. *Cf. National Labor Relations Board v. J. H. Rutter-Rex Mfg. Co.,* 396 U.S. 258, 266 & n. 3 (1969) (dictum).

We conclude that the district court erred insofar as it barred the EEOC's back pay claim on the basis of the California limitations period.

IV.

SCOPE OF THE EEOC'S COMPLAINT

In her original charge filed with the EEOC, Ms. Edelson alleged that Occidental refused, on account of sex, to provide her with maternity leave, other pregnancy benefits, insurance, vacation benefits and seniority rights.

In the course of its investigation the EEOC discovered apparent discrimination against unmarried female employees in the distribution of "pregnancy-related benefits." It also discovered apparent discrimination against male employees in the administration of the retirement system. Although these forms of alleged discrimination were not mentioned in the original charge, the EEOC included them in subparagraphs 8(b) and 9(c) of its complaint. Occidental argued successfully below that these charges should be dismissed as being outside the scope of the original charge.

As amended in 1972, Section 710 of Title VII provides:

> For the purpose of all hearings and investigations conducted by the [EEOC] or its duly authorized agents or agencies, section 11 of the National Labor Relations Act (49 Stat. 455; 29 U.S.C. 161) shall apply.

[86 Stat. 109; 42 U.S.C. § 2000e-9]

While the investigation in this case preceded the 1972 amendment of Section 710, it is clear that the prior statute was similar in scope. *See Motorola, Inc. v. McLain,* 484 F.2d 1339, 1342-44 (7th Cir. 1973); *Graniteville Co. v. Equal Employment Opportunity Comm'n,* 438 F.2d 32, 39 (4th Cir. 1971).

Section 11(1) of the National Labor Relations Act [29 U.S.C. § 161(1)] provides in part that the NLRB may gain access to "any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question." This language was given a broad reach in *National Labor Relations Board v. Wyman-Gordon Co.,* 394 U.S. 759, 768 (1969).

Section 709(a) of Title VII [42 U.S.C. § 2000e-8(a)] today provides, as it did in 1964:

> In connection with any investigation of a charge filed under section 706, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this title and is relevant to the charge under investigation.

Had Occidental believed that the EEOC's investigation exceeded the permissible statutory scope, it could have refused the EEOC's demand for access and sought adjudication of its rights.[16] Occidental did not do so. Thus we can only conclude that the EEOC investigation was reasonable and that the information supporting the allegations in subparagraphs 8(b) and 9(c) was acquired during that reasonable investigation.

In *Equal Employment Opportunity Comm'n v. General Electric Co.*, ... F.2d ...., ... (4th Cir. Jan. 22, 1976), the Fourth Circuit held:

> *So long as* [*discovery of*] *the new discrimination arises out of the reasonable investigation of the charge filed,* it can be the subject of a "reasonable cause" determination, to be followed by an offer by the Commission of conciliation, and, if conciliation fails, by a civil suit, without the filing of a new charge on such claim of discrimination. In other words, the original charge is sufficient to support action by the EEOC as well as a civil suit under the Act for *any discrimination stated in the charge itself or* [*discovered*] *in the course of a reasonable investigation of that charge,* provided such discrimination was included in the reasonable cause determination of the EEOC and was followed by compliance with the conciliation procedures fixed in the Act.

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[16]*See Local No. 104, Sheet Metal Workers International Ass'n v. Equal Employment Opportunity Comm'n,* 439 F.2d 237, 241-43 (9th Cir. 1971); *Circle K Corp. v. Equal Employment Opportunity Comm'n,* 501 F.2d 1052 (10th Cir. 1974); *Joslin Dry Goods Co. v. Equal Employment Opportunity Comm'n,* 483 F.2d 178 (10th Cir. 1973); *Motorola, Inc. v. McLain, supra; Graniteville Co., supra.*

(Emphasis in original.) *Accord, Equal Employment Opportunity Comm'n v. Huttig Sash & Door Co.,* 511 F.2d 453, 455 (5th Cir. 1975); *Equal Employment Opportunity Comm'n v. Kimberly-Clark Corp.,* 511 F.2d 1352, 1363 (6th Cir. 1975). We agree with the reasoning of the Fourth, Fifth and Sixth Circuits.[17]

In this case, Occidental received adequate notice during administrative investigation of the substance of the issues subsequently raised in subparagraphs 8(b) and 9(c) of the EEOC's complaint. Reference was made to those issues in both the District Director's Findings of Fact (February 25, 1972), and the EEOC's Determination of Reasonable Cause (February 8, 1973). Thus the EEOC complied with the statute by presenting these issues for conciliation. *See* Section 706(f)(1) [42 U.S.C. § 2000e-5(f)(1)].

We note that the EEOC itself could independently bring charges based upon the information it reasonably acquired during the investigation of Ms. Edelson's charge. *See* Section 706(b) [42 U.S.C. § 2000e-5(b)]. To require the EEOC to pursue that route, rather than allowing it to include the new charges along with the original one in a single Determination of

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[17]In so agreeing we do not depart in any respect from our recent decision in *Oubichon v. North American Rockwell Corp.,* 482 F.2d 569 (9th Cir. 1973), in which we stated:

> "When an employee seeks judicial relief for incidents not listed in his original charge to the EEOC, the judicial complaint nevertheless may encompass any discrimination like or reasonably related to the allegations of the EEOC charge, including new acts occurring during the pendency of the charge before the EEOC."

Id. at 571.

Oubichon involved the complaint of a private party, he being subject to traditional notions of standing. We deal here with a complaint filed by a public agency seeking vindication of public rights.

Reasonable Cause, would be to champion form over substance and to generate "an inexcusable waste of valuable administrative resources" and "intolerable delay," in violation of statutory purpose. *General Electric, supra,* .... F.2d at ...., 11 C.C.H.—Empl. Prac. Dec. at 6614.

It remains true that Ms. Edelson would not have had "standing" to charge Occidental with discrimination against unmarried female employees (Ms. Edelson was married), or against male employees with respect to retirement. However, as we have discussed earlier, the EEOC is charged with the vindication of public policy, not merely with the enforcement of private rights. In this case, enforcement by the EEOC of the objectives to Title VII should not be frustrated because a private charging party may not have had "standing" to make a particular claim.

Finally, it is argued that "amendment" by the EEOC of the original charge may operate to the detriment of the charging party. In this case such a result is speculative. In any case, the charging party should be able to intervene in either the administrative or judicial proceeding to insure that his or her rights are fully protected. *See* Section 706(f)(1) [42 U.S.C. § 2000e-5(f)(1)].

For the above reasons, we conclude that the district court erred in dismissing subparagraphs 8(b) and 9(c) of the EEOC's complaint.

V.
CONCLUSION

The judgment of the district court is reversed and the cause is remanded for further proceedings consistent with this opinion.

Section 706(f)(1) of Title VII of the Civil Rights Act of 1964, as Amended, 42 U.S.C. Section 2000e-5(f)(1) (1976).

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of

reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has notified a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved, or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivisoin, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

No. 76-99

In the Supreme Court of the United States

OCTOBER TERM, 1976

OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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MEMORANDUM FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

The Equal Employment Opportunity Commission brought this action against petitioner in February 1974 in the United States District Court for the Central District of California, alleging that petitioner had engaged in unlawful employment practices in violation of Title VII of the Civil Rights Act of 1964 by discriminating on the basis of sex. The Commission sought an injunction and an award of back pay for the persons adversely affected by the allegedly unlawful practices.

The Commission's suit was based on a charge lodged with the Commission by Tamar Edelson in December 1970. The charge was initially referred to the appropriate state agency and was formally filed with the Commission in March 1971.

The district court dismissed the Commission's complaint on the ground, *inter alia*, that it was untimely. The court ruled that an action by the Commission must be filed within 180 days from the filing of the charge upon which it is based. Alternatively, the court held that the Commission's suit was barred by the one-year limitation period established by California law.

The court of appeals reversed and remanded (Pet. App.). It held (1) that the Commission's authority to file suit is not limited to 180 days from the filing of a charge, and (2) that the Commission is not subject to state statutes of limitation when it seeks injunctive relief or back pay.

Petitioner's principal contention is that the Commission's suit is barred, insofar as it seeks back pay, by the one-year state statute of limitations.[1] It has long been settled, however, that, in the absence of clear congressional intent to the contrary, state statutes of limitations do not run against the United States or its agencies. *United States* v. *Thompson*, 98 U.S. 486; *United States* v. *Nashville, Chattanooga & St. Louis*

[1]The petition presents two additional questions: (1) whether the Commission's suit is precluded under Title VII because it was not brought within 180 days of the filing of the charge, and (2) whether the request for injunctive relief is barred by the state statute of limitations. Petitioner acknowledges, however, that neither issue independently warrants review by this Court; it asserts only that, "if this Court grants the writ of certiorari concerning the applicability of state statutes of limitations to back pay claims asserted by the EEOC on behalf of private individuals, * * * it would be advisable" to review the additional issues as well to permit "full consideration of all of the available options" (Pet. 9). For the reasons stated in the opinion of the court of appeals, petitioner's contentions with respect to these other issues are without merit (Pet. App. 4-6). Every court of appeals that has considered these issues has rejected petitioner's arguments (see Pet. App. 4 n. 5, 6).

Railway Co., 118 U.S. 120; *Davis* v. *Corona Coal Co.*, 265 U.S. 219; *Board of Commissioners* v. *United States*, 308 U.S. 343; *United States* v. *Summerlin*, 310 U.S. 414. The decisions on which petitioner relies (Pet. 13) are cases in which the Court found that the government was only a nominal plaintiff with no real stake in the outcome of the litigation.

The present suit by EEOC is not in that category. Although the complaint seeks an award of back pay for the injured victims of petitioner's unlawful employment practices, that relief has an overriding public importance in which the Commission has a substantial interest. As this Court stated in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417, "[b]ackpay has an obvious connection with" the central objective of Title VII to eradicate employment discrimination throughout the economy.

> If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." [422 U.S. at 417-418.]

Petitioner relies on *United States* v. *Georgia Power Co.*, 474 F. 2d 906 (C.A. 5), and *Equal Employment Opportunity Commission* v. *Griffin Wheel Co.*, 511 F. 2d 456 (C.A. 5), on rehearing, 521 F. 2d 223, for the proposition that a state statute of limitations is "applicable to the back pay aspect of an employment discrimination suit" brought by the government under Title VII (Pet. 5). The

Fifth Circuit's decisions rest on the premise that insofar as a Title VII complaint filed by the government "seeks recovery of back pay it is private and not public in nature" (511 F. 2d at 459). That premise was subsequently undercut by this Court's decision in *Albermarle*, which identified and emphasized the public importance of back pay relief under Title VII. The Fifth Circuit may be expected to reconsider its holding in *Georgia Power* and *Griffin Wheel* in light of *Albemarle*, and there is consequently no need for this Court to resolve the issue at this time.

Moreover, the court in *Griffin Wheel* left open the question whether the state statute of limitations is tolled during the pendency of administrative proceedings before the EEOC (521 F. 2d at 224-225). The practical effect of the Fifth Circuit's holding will therefore not be evident until that issue has been resolved.

Finally, this would not be an appropriate case in which to resolve the alleged conflict in any event. The Fifth Circuit's opinion in *Griffin Wheel* stated that, in determining the date on which the cause of action accrued for purposes of the applicable statute of limitations, the court must determine "the date of the last act of discrimination" (511 F. 2d at 459). Since the Commission's complaint in this case alleged continuing violations of Title VII by petitioner, it was timely filed with respect to the back pay request even under the *Griffin Wheel* standard.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
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NOVEMBER 1976.

DOJ-1976-11

IN THE

Supreme Court of the United States

October Term, 1976
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OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA,

Petitioner,

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Respondent.

Reply Memorandum in Support of Petition for a Writ of Certiorari.

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Reply Memorandum in Support of Petition for a Writ of Certiorari.

The EEOC's Memorandum in Opposition offers essentially four reasons why certiorari should be denied—none of which has merit.

First, the five Supreme Court decisions cited by the EEOC on pages 2-3 of its Memorandum for the proposition that state statutes of limitation are inapplicable to the United States or its agencies each involved an action where the government was suing as the sovereign to protect *itself* from injury. By contrast, where the government has sued to protect the rights of private citizens, state statutes of limitation have *never* before been found inapplicable. Indeed, the EEOC implicitly concedes—as it must—that no Supreme Court decision to date has *ever* found the United States government or one of its agencies to be immune from the state statute of limitations where the government

or agency was suing to collect money on behalf of private individuals—as they are in the case at bar.

Indeed, this distinction was the very foundation of the two Fifth Circuit decisions which found—contrary to the Ninth Circuit decision sought to be reviewed here—that "the most analogous" state statute of limitations was applicable to the back-pay portion of government actions under Title VII:

> "Where the government is suing to enforce rights belonging to it, state statutes of limitation are not applicable. [Citing some of the same decisions the EEOC urges in the case at bar.] However, this principle is not apropos to the present back pay claims. Insofar as the pattern or practice suit [by the Attorney General under Section 707 of Title VII] constitutes a proper legal conduit for the recovery of sums due individual citizens rather than the treasury, it is a private and not a public action. [Citing the principal decision we urge in the case at bar.] These personal claims are entitled to no superior status because they are here allowed to be asserted in the Attorney General's suit as well as in the private class action."
>
> *United States v. Georgia Power Co.*, 474 F.2d 906, 923 (5th Cir. 1973).

Second, while *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975), certainly established the deterrent value of the back-pay remedy in the enforcement of Title VII, there is absolutely nothing in *Albemarle* to suggest that the threat of back-pay liability must or should be *interminable* in order to be effective.

Third, the EEOC's speculation that the Fifth Circuit will suddenly retreat from its position taken in two

different decisions by six different judges is pure conjecture. Petitioner is aware of no subsequent Fifth Circuit decision to date which suggests any such retreat. Furthermore, the Fifth Circuit decisions were reached after a full discussion of the significant role which back-pay awards do serve under Title VII, with language not unlike that found in *Albemarle*.[1] Thus, to deny certiorari on the rank speculation that the present unequivocal circuit split might someday disappear is simply to perpetuate the interminable delays which have obviously become a comfortable way of life for the EEOC in its enforcement of Title VII.

The EEOC's final effort to avoid the unequivocal circuit split is equally untenable. Whether the practical effect of the final resolution of the tolling issue in *Griffin Wheel* will be to permit or to bar that suit has absolutely no relevance to the propriety of resolving now the threshold issue of whether state statutes of limitations are applicable or not, for obviously one never reaches the tolling issue unless such statutes *are* applicable. Similarly, the EEOC's mere allegation that the violations are continuing—particularly in the face of the statement in the underlying charge that "October 1, 1970" was "the most recent date on which this discrimination took place"—must not divert this Court from resolving the basic issue of whether the

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[1] *United States v. Georgia Power Co.*, 474 F.2d 906, 921 (5th Cir. 1973):

> "Given this court's holding that '[a]n inextricable part of the restoration to prior [or lawful] status is the payment of back wages properly owing to the plaintiffs' [citation omitted], it becomes apparent that this form of relief may not properly be viewed as a mere adjunct of some more basic equity. It is properly viewed as an integral part of the whole of relief which seeks, not to punish the respondent [,] but to compensate the victim of discrimination."

state statute of limitations applies or not. Like the "tolling" point, the "continuing violation" issue can become relevant only after the threshold issue presented by this Petition has been resolved.

Dated: November 19, 1976.

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IN THE

Supreme Court of the United States

October Term, 1976
No. 76-99

OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA,

Petitioner,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

BRIEF FOR THE PETITIONER.

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Cases Page

Miscellaneous

Statutes

Textbooks

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Opinions Below.

This Court granted certiorari to review the opinion of the Court of Appeals for the Ninth Circuit which is officially reported at 535 F.2d 533 (9th Cir. 1976), and which appears in the Appendix at pages 25-43. The opinion of the District Court for the Central District of California was not officially reported but is unofficially reported at 12 FEP 1298 and appears in the Appendix at pages 19-24.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 11, 1976, and the Petition for Certiorari was filed on July 23, 1976, less than 90 days thereafter. The petition was granted on December 13, 1976. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

Statutory Provision Involved.

Section 706(f)(1) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e-5(f)(1) (hereinafter "Title VII"), is the statutory provision which confers on the Equal Employment Opportunity Commission (hereinafter the "EEOC") the authority to file suit in the federal district courts. Section 706(f)(1) is lengthy and is thus set forth in its entirety in the Appendix at pages 43-44; the most pertinent language thereof is set forth at pages 18-19 of this Brief.

Questions Presented for Review.

1. Whether Congress intended that there be no time limitation whatsoever applicable to the EEOC's right to sue under Title VII?

2. Whether Congress intended the 180-day provision in Section 706(f)(1) to serve as a federal limitation period on the EEOC's right to sue?

3. Assuming *arguendo* that there is no federal limitation period, whether the most analogous state limitation period is applicable to the EEOC's right to sue?

Statement of the Case.

On December 27, 1970, Tamar Edelson filed a charge of discrimination against Petitioner with the EEOC alleging that she had been discriminated against because of her sex. Her charge specified that "the most recent date on which this discrimination took place" was "October 1, 1970," the date of her discharge by Petitioner (A. 2).

Although the EEOC acknowledged receipt of Ms. Edelson's charge on December 30, 1970, the EEOC

did not formally file her charge until March 9, 1971. The EEOC acknowledges that this charge is the only charge upon which its complaint herein is based.

However, it was not until February 22, 1974—three years, four months and 22 days after the occurrence of the act of discrimination of which Ms. Edelson had complained—that the EEOC finally filed this complaint seeking back pay for Ms. Edelson and innumerable other private individuals as well as injunctive relief (A. 9-13). The District Court dismissed the EEOC's complaint upon the grounds that (1) Section 706 of Title VII imposed a 180-day federal limitation period on the EEOC's right to sue, and (2) alternatively, assuming that no federal limitation period exists, the EEOC's suit was barred by the most analogous state limitation period (A. 20-24).

On May 11, 1976, the Court of Appeals for the Ninth Circuit reversed on both grounds, holding that there was *no time limitation whatsoever* on the EEOC's right to sue. First, the Ninth Circuit found that the 180-day language of Title VII does not constitute a federal limitation period, so that "there is simply no governing federal limitations period" (A. 27-29). Second, expressly departing from two recent decisions of the Court of Appeals for the Fifth Circuit, the Ninth Circuit refused to apply the most analogous state limitation period (A. 29-37). This Court granted the Petition for Certiorari to review both holdings of the Ninth Circuit.[1]

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[1]The Ninth Circuit had also held, in part IV of its Opinion (A. 38-42), that the EEOC's right to sue was not limited to matters raised by the underlying charge. However, review was not sought on that holding and thus that aspect of the Ninth Circuit's opinion is not before this Court.

Summary of Argument.

This Court has three options with regard to the duration of the EEOC's right to sue under Title VII: (i) the right is interminable, (ii) the right is governed by a federal limitation period, or (iii) the right is governed by the most analogous state limitation period.

A. There is absolutely no suggestion in the 1972 debates that Congress, in conferring the right to sue on the EEOC, intended that right to be interminable. Quite to the contrary, Congress granted the right to sue to the EEOC for the express purpose of eliminating the 18-24 month delays of the EEOC in resolving charges of discrimination. Pervading the 1972 debates was a universal Congressional determination that such EEOC delays were intolerable and would be eliminated once the EEOC had the right to sue. The absence of any limitation period would, contrary to the Congressional purpose, subject charging parties to interminable delay and respondents to interminable liability. The only serious issue, therefore, is whether Congress intended a federal limitation period or was content to leave the matter to the most analogous state limitation period.

B. The 180-day provision in the 1972 Amendments authorizing the EEOC to file suit was intended and understood by Congress to be a federal limitation period on that right. Senators Dominick and Javits, the principal spokesmen in the final days of the 1972 debates, both explained that the EEOC's right to sue ended on the 180th day after the charge was filed. Furthermore, the entire enforcement scheme enacted in 1972 requires such expeditious action by the EEOC if the time limitations imposed on the charging party and

on the federal district court are to have any meaning at all. The EEOC's current practice of totally ignoring the 180-day provision frustrates the clear purpose of the Act—to protect the interests both of charging parties and respondents by resolving charges of discrimination expeditiously.

C. Assuming *arguendo* that the 180-day provision does not constitute a federal limitation period, judicial authority and the legislative history require the application of the most analogous state limitation period. This Court and the lower federal courts have consistently applied the most analogous state limitation period in the absence of a federal limitation period, with only one exception. That exception has been limited by this Court to suits brought by the United States as a sovereign to protect its rights as a sovereign, *i.e.*, to collect money for the United States Treasury or to prevent an injury to the United States Government itself. Any enlargement of that existing exception would frustrate rather than further the purposes of Title VII.

ARGUMENT.

A. The Legislative History of the 1972 Amendments to Title VII Reveals a Congressional Intolerance With Existing EEOC Delays Which Necessarily Precludes Any Congressional Intention to Give the EEOC an Interminable Right to Sue.

Congress, in originally enacting Title VII in 1964, withheld from the EEOC any right to sue. Instead, the EEOC was limited to investigation and conciliation, followed if necessary by private or Justice Department litigation. As a result, by April 1971, the EEOC was taking an average of 18 to 24 months to dispose of charges brought before it.[2]

Thus, by the fall of 1971, Congress had become appalled by the slow pace of the existing enforcement procedure under Title VII, and the effort began in Congress to devise a faster and more effective method of enforcement. Indeed, as the debates concerning the 1972 Amendments continued, it became apparent that the key issue was not *whether* Title VII enforcement should be more expeditious, but *how* it could be made more expeditious than the existing 18-24 month EEOC average.[3]

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[2]That was the testimony of EEOC Chairman Brown in April 1971, which 18-24 average became the accepted figure during the 1972 debates concerning the current EEOC case-handling delays. SENATE SUBCOMM. ON LABOR OF THE COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG., 2D SESS., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 121 (Comm. Print 1972) [hereinafter cited as 1972 LEG. HIST. Excerpts from the legislative history are contained in a separate volume lodged with the Court for its convenience in reviewing the portions of the legislative history cited in this Brief.].

[3]Congressman Quie, the ranking minority member of the House Committee on Education and Labor, noted in debate on September 15, 1971, that virtually all members of the Committee agreed on the need for giving enforcement powers to the EEOC:

> "[D]isagreement arose *only* as to which method of enforcement would be not only most effective but, expeditious, fair and equitable as well." [Emphasis added].

1972 LEG. HIST. 200.

One group of Congressmen, led principally by Senator Javits and Senator Williams, proposed to expedite the process by giving the EEOC "cease and desist" authority like that possessed by the National Labor Relations Board and many other federal agencies.[4] Other Congressmen, however, led principally by Senator Dominick and Congressman Erlenborn, opposed such adjudicative authority for the EEOC, convinced instead that authorizing the EEOC to file its complaint in the federal district courts would provide more expeditious and effective enforcement of Title VII than authorizing the EEOC to adjudicate cases on its own.[5]

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[4]Senator Williams and Senator Javits were co-sponsors of Senate Bill 2515, which originally provided for cease and desist enforcement powers. 1972 LEG. HIST. 34[illegible], 382-83. Senator Williams was chairman of the Senate Committee on Labor and Public Welfare, which favorably reported S. 2515 to the floor of the Senate, and he was the floor manager for the bill. 1972 LEG. HIST. (II), 410, 652. During the debates on S. 2515, Senator Javits and Senator Williams spoke frequently and vigorously in favor of the cease and desist approach.

[5]Senator Dominick consistently was the leading advocate in the Senate of court enforcement. As a member of the Senate Committee on Labor and Public Welfare, he dissented from the majority report on S. 2515 and urged court enforcement rather than the cease and desist mechanism provided by the bill reported to the floor. 1972 LEG. HIST. 493, 495. Dominick's Amendment No. 884 to S. 2515 provided for court enforcement. 1972 LEG. HIST. 1499-1504. Amendment No. 884 was substituted for a Javits-Williams "compromise" amendment to S. 2515 in the late stages of the debate. 1972 LEG. HIST. 1556-57. Thus, S. 2515 as finally passed by the Senate included the Dominick court enforcement procedure. 1972 LEG. HIST. 1560-61, 1778-79. Congressman Erlenborn was a member of the House Committee on Education and Labor, which favorably reported a cease and desist proposal (H.R. 1746).

(This footnote is continued on next page)

In the amendment which eventually passed, Congress determined that EEOC "court enforcement" was the most expeditious manner of Title VII enforcement. Thus, Section 706(f)(1) was amended in 1972 to authorize the EEOC to file suit in federal district court on the basis of a specific underlying charge whenever the EEOC was unable to secure an acceptable conciliation agreement within 30 days after the charge had been filed.

1. Fairness to Charging Parties.

The discussions leading up to that final resolution are very revealing as to what Congress expected by way of expeditious EEOC action in the future. First, it must be remembered that the entire dispute arose because of the universal dissatisfaction with the EEOC's existing 18-24 month delay in charge resolution. All agreed that a faster resolution was necessary—the dispute was how—and all obviously believed that the changes enacted in 1972 would *eliminate, not perpetuate* the EEOC 18-24 month delays.

Second, the court enforcement bill which was eventually enacted in Section 706(f)(1) was introduced by Senator Dominick, who served as the principal Congressional spokesman as to its meaning and merits. During the floor debate on January 20, 1972, Senator Dominick defended his proposal on the ground that

> "I do not care who it may be, or how long they may have been claiming discrimination, *if they*

Representative Erlenborn joined in a minority committee report that favored court enforcement. 1972 LEG. HIST. 118-27. Along with Congressman Mazzoli, Congressman Erlenborn sponsored the "Erlenborn-Mazzoli" substitute for H.R. 1746, which provided for court enforcement and was eventually adopted by the House. 1972 LEG. HIST. 141-47, 311-14, 321-23.

> *have to wait 20 months* before they even find out whether or not the Commission feels that the charge is valid, all one can say is that justice delayed is *justice denied*." [Emphasis added].[6]

Later in the same day's debate, Senator Dominick explained:

> "[W]ith the independent General Counsel that has just been created for the EEOC itself, we would now have the legal machinery to *move rapidly* on the enforcement of whatever legitimate complaints may come before the EEOC which cannot be solved by conciliation.
>
> * * *
>
> "As I said earlier, it seems wrong to me to say to an aggrieved employee, 'Certainly we will hear your case. We will do the investigating. We will bring the charges. We will do everything else, but you will not get a decision for *over 2 years.' That is not justice.* That is not equal employment opportunity. But if we have the investigator saying that this is a legitimate complaint, and that it will be brought to the district court and will get priority treatment there, we can get the matter decided in *half the time* it would take in any other way." [Emphasis added].[7]

On January 24, 1972, Senator Dominick pointed out another substantial advantage of court enforcement:

> "The *imminence of court action,* coupled with the threat of adverse publicity and immediately

[6] 1972 LEG. HIST. 677.

[7] 1972 LEG. HIST. 681.

enforceable orders will serve as a powerful inducement to voluntary settlement." [Emphasis added].[8]

Later that same day, Senator Dominick again expressed his intolerance for two-and three-year delays:

> "If the Senate is truly interested in an effective, expeditious grievance resolution procedure we should place our trust in our Federal court system. Although cease and desist promises much, a shiny new administrative procedure designed to redress grievances is no better than its performance, and *if it requires 2 to 3 years to achieve justice, its potential is nothing but a frustrating promise of what might have been.*" [Emphasis added].[9]

In his final summation on February 15, 1972, in support of his court enforcement amendment which passed the Senate a few minutes later, Senator Dominick stated:

> "[I]t could take 2½ years from the time a worker walks into a regional NLRB office with a charge until the time a court of appeals finally issues an order that he be reinstated with or without back pay. . . .
>
> "I do not think that this [two and a half year delay from charge to final court order] would be true under job discrimination with the adoption of my amendment. . . ."[10]

Contrast these statements made by the author of the EEOC's Section 706(f)(1) right to sue with the fact that the EEOC took over 36 months in the case at bar just to bring its complaint to the District Court!

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[8]1972 LEG. HIST. 794.
[9]1972 LEG. HIST. 795.
[10]1972 LEG. HIST. 1553.

Furthermore, Senator Dominick's intolerance for the existing 18-24 month EEOC delays was fully shared by those who supported the cease and desist alternative. Indeed, the principal argument made by the cease and desist proponents against court enforcement was based on the statistic that the median time for federal court resolution of cases was 19 months—a time span the cease and desist proponents found unacceptable.[11] Senator Williams summarized this point well in his remarks during the floor debate on January 24, 1972:

> "When we look at the caseload of the district courts, . . . I am not proud of the fact that from the inception of a case in the State of New Jersey to its conclusion, the time has now reached 29 months. I am not proud of that. Justice delayed, it has been said by wiser authorities than this Senator, is justice denied. Twenty-nine months is a long, long time in the district courts of the State of New Jersey.
>
> I will state that in the State of North Carolina, in the eastern district, *20 months* is the time from the filing of an action to a decision in the case, and *that is too long.*" [Emphasis added].[12]

Such comments from the critics of EEOC court enforcement demonstrate two points. First, no one expressed *any* concern that the EEOC would have diffi-

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[11]*See, e.g.,* remarks by Congresswoman Abzug (1972 LEG. HIST. 275) and Congressman Robison (1972 LEG. HIST. 303). Indeed, Congressman Reid referred to one court case he was aware of where the court delay was 13 months:

> "Even more *outrageous* is the fact that charges were originally brought in this case *3 years ago.*" [Emphasis added].

1972 LEG. HIST. 283.

[12]1972 LEG. HIST. 832-33.

culty getting to court with its complaint promptly. Rather, the whole focus was on how long the courts might take once the EEOC's complaint was filed, and these persons even suggested that the EEOC could complete the *entire* adjudicative process in less than six months.[13] Second, these statements decrying the 19-month median delay in federal courts for resolution of complaints simply demonstrate the conviction that 19 months was an unacceptable period of time to wait for resolution of charges.

Thus, in light of the overwhelming Congressional indignation at the EEOC's 18-24 month delays and the obvious belief on the part of all members of Congress that they were enacting a system to prevent the continuation of that unacceptable situation, how can it seriously be argued that Congress nevertheless intended that the EEOC would have forever to commence suit? Quite obviously, had anyone had the temerity even to suggest such a notion in the halls of Congress, he or she would have been immediately and universally repudiated!

2. Fairness to Respondents.

Furthermore, the 1972 debates reveal substantial concern about the fundamental unfairness to respondents resulting from excessive delays like the 18-24 month delays to which respondents were then being subjected by the EEOC:

> Congressman Mazzoli (Individual Views in Report of House Committee on Education and Labor, June 2, 1971): "Basically, I prefer

[13]S. REP. NO. 92-415, 92d Cong., 1st Sess. 1, 24 (1972), 1972 LEG. HIST. 410, 433.

> the stability, *expedition* and protection to plaintiff and *defendant* alike offered by judicial enforcement. . . ." [Emphasis added].[14]

> Congressman Erlenborn (September 16, 1971): "Mr. Chairman, I urge support of the Erlenborn-Mazzoli substitute, which would give the Commission the right to go into court, resulting in fairness to *both parties*, and *expeditious*, judicial and fair relief." [Emphasis added].[15]

> Senator Dominick (Individual Views in Report of Senate Committee on Lab and Public Welfare, October 28, 1971): "Effective protection of the rights of both the *employer* and the employee demands a *speedy resolution* of the dispute." [Emphasis added].[16]

> Senator Dominick (November 8, 1971): "Mr. President, what this amendment would do is to *guarantee* the protection of *both parties'* rights through fair, effective, and *expeditious* Federal court machinery." [Emphasis added].[17]

> Senator Dominick (January 21, 1972): "This amendment protects the rights of both *respondents* and aggrieved by providing a fair, effective, and *expeditious resolution* of the dispute." [Emphasis added].[18]

[14]1972 LEG. HIST. 129.
[15]1972 LEG. HIST. 284.
[16]1972 LEG. HIST. 495.
[17]1972 LEG. HIST. 549.
[18]1972 LEG. HIST. 695.

Senator Dominick (January 21, 1972): "As I po[i]nted out, effective protection of the rights of both the *employer* and the employee demands a *speedy resolution* of the dispute."[19] [Emphasis added].

Senator Fannin (January 21, 1972): "In addition, court enforcement offers a *more expeditious* settlement, and a *speedy resolution* is vitally important to both an aggrieved employee and to a *respondent employer.*"[20] [Emphasis added].

Senator Brock (January 21, 1972): "I do not feel that it is fair for the Government agencies to keep either *respondents* or complainants waiting years before matters in which they are vitally interested are disposed"[21] [Emphasis added].

Senator Hruska (February 9, 1972): "The *present situation* is quite a hodge-podge. . . . It is *a disservice to the employer not only on the question of expeditiousness,* but also because of the burdens forced on a respondent who is called upon to defend the same case in numerous forums. And it is a *disservice to the public* which should be entitled to quick, clear, and certain resolutions of these questions."[22] [Emphasis added].

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[19]1972 LEG. HIST. 696.
[20]1972 LEG. HIST. 699.
[21]1972 LEG. HIST. 782.
[22]1972 LEG. HIST. 1396.

Senator Hollings (February 16, 1972): "By prevailing for a judicial procedure, we have assured to the *employer* that he will not be unconscionably harassed."[23] [Emphasis added].

The court enforcement procedure enacted was thus designed to provide protection against delay for respondents as well as aggrieved parties. Yet an absence of any limitation on when the EEOC can file suit would guarantee the denial of those rights!

Indeed, such an absence would be abhorrent not only to the legislative intent in 1972 but to the very concept of due process as well, for as Chief Justice John Marshall observed 172 years ago, an absence of some statute of limitations

> "would be utterly repugnant to the genius of our laws. In a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that an individual would remain for ever liable to a pecuniary forfeiture."

Adams v. Woods, 6 U.S. (2 Cranch) 336, 342 (1805).

Additionally, this due process concern for the rights of respondents is a very real one, for at this very time the EEOC has over 120,000 charges before it, many of which are several years old.[24] Witnesses have

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[23]1972 LEG. HIST. 1595.

[24]Augustus Hawkins (D-Calif.), Chairman of the House Labor Subcommittee on Equal Opportunities, noted at the oversight hearings in May 1976 that the Commission has a backlog of 120,000 cases and that some charges have been pending for as long as seven years. 92 BNA LAB. REL. REP. 66 (May 24, 1976).

become unavailable, evidence has been forgotten or lost, and memories have dimmed. Potential financial liabilities are staggering, yet they are often ones which are unclear and against which a respondent cannot protect itself because their nature, extent and duration remain undefined for months and years.

Each one of these stale claims is a time bomb, waiting to be exploded by the EEOC at a time of its choosing—unless of course some limitation period exists. This is true for very real and practical reasons based upon the EEOC's practices and procedures which serve only to exacerbate the travesty created by the EEOC's interminable delay.

First, the EEOC employs various devices so that many charges are *never* closed. For example, the EEOC's Compliance Manual provides that if the charging party wishes to withdraw his or her charge, the EEOC will *not* honor that request but will only administratively close the file.[25] The charge remains officially on record and at any time months or years thereafter, the EEOC can resurrect that charge and file a court action, for as the EEOC ominously advises the respondent at the time of administrative closure, "you will be informed immediately if the charge is reopened for any reason."[26] Similarly, the same Manual prescribes that if the EEOC cannot find the charging party, the charge will be administratively closed[27]—again putting the charge in a position to be resurrected at any time of the EEOC's choosing.

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[25]EEOC Compliance Manual §7.1.

[26]EEOC Compliance Manual Exh. 7-D.

[27]EEOC Compliance Manual §6.5(b).

Second, in addition to the fact that the EEOC, when it does bring suit, normally expands the complaint to include all individuals in the charging party's "class", the situation is aggravated all the more by the fact that the EEOC—with appellate court approval[28]—further expands the complaint to include *any* matter discovered during the investigation of the charge, whether or not the additional matter is of any concern to the charging party or could even have been raised by the charging party.

Thus, if the EEOC's contention that there is no limitation on its right to sue were to be sustained, the EEOC could, for example, take a charge of religious discrimination filed by a male in 1970 and bring suit in 1980 alleging sex discrimination by the same respondent against its 10,000 female employees, back pay liability for which could date back 12 years to 1968.[29] Indeed, that such a result is in fact a real possibility is well illustrated by the case of *EEOC v. Knott's Berry Farm* presently pending in the Central District of California, where the EEOC's complaint, filed in August 1975, alleges extensive "across the board" class

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[28]*EEOC v. General Electric Co.*, 532 F.2d 359 (4th Cir. 1976) (race charge expanded to sex discrimination complaint); *EEOC v. Raymond Metal Products Co.*, 530 F.2d 590 (4th Cir. 1976) (national origin charge expanded to race and sex complaint); *Patterson v. American Tobacco Co.*, 535 F.2d 257, 271 (4th Cir. 1976) (sex charge filed by a man expanded to complaint alleging sex discrimination against women); *EEOC v. Huttig Sash & Door Co.*, 511 F.2d 453, 455 (5th Cir. 1975); *EEOC v. Kimberly-Clark Corp.*, 511 F.2d 1352, 1363 (6th Cir. 1975).

[29]Section 706(g) provides a limitation on back pay liability to two years prior to the filing of the charge. Yet that limited protection for respondents is obviously rendered a nullity if the EEOC can wait three or five or ten years to file suit and is permitted to assert matters in its complaint which were never complained about in the underlying charge.

discrimination against Blacks, Asians, Spanish surnamed Americans, and Jews for the preceding 10½ years based on two individual charges filed in June 1971.[30]

This is not what Congress intended in the 1972 Amendments. Rather, the conclusion is inescapable that Congress intended *some* limitation on the time in which the EEOC could file suit, both to guarantee charging parties prompt and effective action on their charges and to guarantee respondents the fundamental fairness which lengthy delays clearly deny. The only serious issue, therefore, is whether Congress intended a federal limitation period or was content to leave the matter to the most analogous state limitation period.

B. Congress Intended the 180-Day Provision in Title VII to Serve as the Federal Limitation Period on the EEOC's Right to Sue.

The authority to sue which Congress gave the EEOC in 1972 is set forth in Section 706(f)(1) of the Act (A. 43-44):

> "[1] If within thirty days after a charge is filed with the Commission . . . the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against . . . [the] respondent . . . [2] *if within one hundred and eighty days from the filing of such charge* . . . the Commission has not filed a civil

[30]No. CV-75-2739-AAH (C.D. Cal., filed August 15, 1975).

As another concrete example of extraordinary EEOC delay aggravated by great expansion of the eventual complaint, the Ninth Circuit in the instant case approved the EEOC's expansion of a charge filed by a pregnant female employee to include alleged causes of action relative to retirement benefits for male employees.

> action under this section . . . , *the Commission . . . shall so notify the person aggrieved* and [3] within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved . . . . [4] Upon timely application, the court may, in its discretion, permit the Commission . . . to intervene in such civil action upon certification that the case is of general public importance."[31] [Emphasis added].

Petitioner submits, for the reasons set forth below, that the 180-day provision italicized above was intended by Congress to serve as a time limitation on the EEOC's right to file suit.

While the appellate courts to date which have confronted this issue have each concluded that the foregoing 180-day provision was not intended as a time limitation on the EEOC's right to sue[32],

> "[I]t is the persuasiveness of judicial reasoning and not the force of numbers which is of prime importance in our system."[33]

[31]The numbers in brackets are inserted to assist analysis; they do not appear in the statute itself.

[32]*EEOC v. Duval Corp.*, 528 F.2d 945, 947 (10th Cir. 1976); *EEOC v. E. I. du Pont de Nemours & Co.*, 516 F.2d 1297, 1301-02 (3d Cir. 1975); *EEOC v. Kimberly-Clark Corp.*, 511 F.2d 1352, 1356-57 (6th Cir.), *cert. denied*, 96 S. Ct. 420 (1975); *EEOC v. Meyer Bros. Drug Co.*, 521 F.2d 1364 (8th Cir. 1975); *EEOC v. Cleveland Mills Co.*, 502 F.2d 153, 159 (4th Cir. 1974), *cert. denied*, 420 U.S. 946 (1975); *EEOC v. Louisville & Nashville R.R.*, 505 F.2d 610 (5th Cir. 1974), *cert. denied*, 423 U.S. 824 (1975).

[33]*EEOC v. Louisville & Nashville R.R.*, 505 F.2d 610, 618 (5th Cir. 1974), *cert. denied*, 423 U.S. 824 (1975) (Judge Moore's dissent from majority's holding that 180-day

(This footnote is continued on next page)

Petitioner respectfully submits that *none* of these appellate court decisions reflects an understanding of the significant legislative history concerning this issue.

Petitioner has set forth *supra* pages 6-18 the 1972 genesis of the EEOC right to sue and the overwhelming Congressional concern with expeditious EEOC enforcement of Title VII. With specific regard to the 180-day provision, the legislative history and the statutory scheme itself both demonstrate that that provision embodies the time limitation Congress intended on the EEOC's right to sue.

1. Legislative History.

Senator Dominick stated during the Congressional debate on February 7, 1972:

> "The amendment [giving the EEOC the right to sue] contains several cosmetic differences from the original amendment [to the same effect] as well as *one substantial change* which *reduces the time period within which the Commission may file a civil action* against the respondent from 180 to 150 days from the time the Commission first issues its informal charge." [Emphasis added].[34]

provision did not constitute federal limitation period). This point of course pervades our judicial system, as most recently illustrated by this Court's holding in *General Electric Co. v. Gilbert*, 45 U.S.L.W. 4031 (Dec. 7, 1976), wherein the Court rejected the unanimous view of six appellate court decisions concerning the validity of pregnancy exclusions from disability plans. 45 U.S.L.W. at 4037 (Brennan & Marshall, JJ., dissenting).

[34]1972 LEG. HIST. 1347. The amendment of which Senator Dominick spoke, Amendment No. 871, contained the same time period (150 days) as the Dominick measure finally adopted by the Senate (No. 884). 1972 LEG. HIST. 1348-49, 1499-1500. An earlier Dominick proposal had provided a 180-day

Several days later, Senator Javits, describing the court enforcement procedure ultimately enacted into law, stated:

> "Let us understand that we are dealing with a round period of approximately 150 days, that *that is the allowable time* for the Commission to move into a given situation. The first 30 days represents an effort to conciliate, *making a total of six months.* So that is the Commission operation. *At the end of 6 months, it becomes plenary.*" [Emphasis added].

1972 LEG. HIST. 1528.

Of tremendous significance, the first dictionary meaning of plenary is "complete," and no other meaning permits any interpretation other than that, in Senator Javits' view, the EEOC was *finished* after six months.[35] Equally significant, no Senator or Congressman ever took issue with either Senator's explanation of the 180-day provision they were discussing, which was eventually adopted by Congress in Section 706(f)(1).

Senators Dominick and Javits had another discussion two weeks *earlier* about whether the statute should say that the EEOC "shall" or "may" file suit after 30 days. 1972 LEG. HIST. 892-894. Both Senators

period in which the Commission could sue, 1972 LEG. HIST. 553-55, as did the House-passed "Erlenborn-Mazzoli substitute," and it was this period, rather than 150 days, that was finally adopted by both houses in accordance with the conference report. 1972 LEG. HIST. 1800, 1803.

[35]Later on February 15, 1972, Senator Javits in debate referred to six months as "the maximum bracket of the Commission." 1972 LEG. HIST. 1537. While it is not entirely clear whether Senator Javits was referring to an earlier Dominick proposal (1972 LEG. HIST. 553-55) or to the original language of Senate Bill 2515 (1972 LEG. HIST. 390-91), both contained the 180-day language which now appears in Section 706(f)(1).

agreed to change "shall" to "may" in order to make clear that the EEOC was not required to file suit on the 31st day after the charge was filed. It is clear from the context of those remarks that the Senators were concerned about not imposing a strict limitation on the *front end* of when the EEOC had to file suit.[36] The very fact that they were debating this distinction, however, demonstrates that both expected that the EEOC would act promptly on charges.

On the other hand, with regard to an *ending* limitation on the EEOC's right to sue, Senator Javits expressed the concern during this discussion that

> "[*D*]*o we not have to have some cutoff time* as far as the Commission is concerned, with respect to its exercise of that discretion in bringing a civil action . . . ." [Emphasis added].

1972 LEG. HIST. 893. Responding to that concern—which is of course precisely the concern which Petitioner raises here—Senator Dominick clearly *agreed* with Senator Javits that a "cutoff time" was required with respect to the EEOC's right to file suit.[37]

[36]Thus, it was in this context that Senator Javits stated,

> "[T]he reason for the modification is that I do not feel, with an agency of this character, that the word 'shall' would have any greater meaning than the word 'may' and also because I feel the Commission should not, in view of its purpose, be under the kind of strict timetable within the parameters, of course, that the amendment sets out that it would otherwise be if we left the word 'shall' which is mandatory. We assume that they must obey the law in the amendment,"

and Senator Dominick replied,

> "I think this change is very meritorious, as I pointed out in my first statement. I do not think the Commission should be mandated on what date an agency should bring suit when we are trying to work out matters the best we can by conciliation."

1972 LEG. HIST. 894.

It is quite apparent that both Senator Javits and Senator Dominick saw *the existence* of a cutoff time on the EEOC's right to sue, which Senator Dominick reconfirmed two weeks later by his statement concerning "the time period within which the Commission may file a civil action," and which Senator Javits reconfirmed on the day the bill passed by his statement about "the *allowable* time for the Commission to move into a given situation." [Emphasis added].

Thus, the legislative history provides clear evidence of a Congressional intention to terminate the EEOC's right to sue at 180 days, and absolutely no evidence of *any* Congressman's belief that the EEOC could sue thereafter.

2. Title VII's Enforcement Scheme.

Section 706 envisions that the aggrieved party shall have 180 days to file his or her charge of discrimination with the EEOC;[38] after which filing the EEOC has 180 days to file its action; at which time the EEOC, if it has not filed suit, "shall" notify the person aggrieved of his right to sue; after which notification a private action "may be brought" within 90 days. While it is established that both of the aggrieved party's

[37]Although in this instance Senator Dominick used the words "private filing restriction" to describe the 180-day period, that phrase was used in direct response to Senator Javits' question and was obviously intended to be synonymous with the "cutoff time" on the EEOC's right to sue which both very clearly agreed should exist. 1972 LEG. HIST. 893. Senator Javits clearly accepted the explanation that the existing 180-day language met his concern that we "have to have some cutoff time as far as the Commission is concerned."

[38]With specific exceptions not here relevant. Section 706(e).

filing deadlines are federal limitation periods,[89] the Ninth Circuit held that there was *no* limitation at all on the EEOC's right to bring suit.

It is to be noted, however, that Section 706(f)(1) explicitly provides that the EEOC may intervene in the aggrieved party's action *only* in the court's discretion and *only* "upon certification that the case is of general importance." Thus, the EEOC is arguing that its right to sue exists after 180 days while necessarily having to admit that its right to intervene after 180 days is expressly limited to cases certified by a court to be of "general public importance." Yet if Congress truly intended that the EEOC's right to sue continued after 180 days, there would have been absolutely no reason even to mention the EEOC's right to intervene, for that right would be inherent in any right to sue. Even more obviously, there would be no reason to restrict the right to intervene as severely as Congress did if the EEOC could sue on its own at any time without any limitation. The only logical explanation of the limited intervention right after 180 days is that the EEOC's right to sue expires at 180 days and the EEOC may participate in a suit filed thereafter *only* as an intervenor in the limited circumstances set forth in the statute.

Furthermore, the Act's provisions setting forth the duties of the federal district courts dictate the conclusion that a time limitation on the EEOC's filing of court action *must* have been intended by Congress in the 1972 Amendments. Section 706(f) provides that once the EEOC files suit,

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[89]*E.g., Guy v. Robbins & Myers, Inc.*, 525 F.2d 124 (6th Cir. 1975) (charge filing deadline), *rev'd on other grounds*, 45 U.S.L.W. 4068 (Dec. 20, 1976); *Hinton v. CPC Int'l, Inc.*, 520 F.2d 1312 (8th Cir. 1975) (suit filing deadline); *Wong v. Bon Marche*, 508 F.2d 1249 (9th Cir. 1975) (same).

> "(4) It shall be the duty of the chief judge of the district . . . *immediately* to designate a judge in such district to hear and determine the case . . . ." [Emphasis added].

And further,

> "(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and *to cause the case to be in every way expedited.*" [Emphasis added].

In other words, the federal district courts are to move mountains in order to have the case heard as promptly as possible.

Given that unmistakable command, which imposes a considerable burden on the federal district courts, how can it be seriously argued that the EEOC nevertheless can take as long as it wishes to bring the matter to court? The statutory command of immediate federal court action is made a mockery if, as the EEOC insists, it has the right to wait three and one-half years, or five years, or even longer before filing its suit. If Congress really intended to permit the EEOC to wait interminably, would Congress have put such a burden on the federal district courts to act so quickly?

In short, it is simply inconceivable that Congress expected such immediate action by both the charging party and the federal district court, and yet none at all by the EEOC. If the 180-day provision does not cut off the EEOC's right to sue, then the EEOC is the only party in the entire process which has no federal time limitation at all.

3. The Backlog of Charges in 1972.

Despite this clear evidence of Congressional intent, the primary, if not the sole, reason why the appellate courts refused to find a 180-day limitation was the argument that Congress knew in 1972 that charges before the EEOC frequently took one to two years to process, and thus Congress could not possibly have intended to require the EEOC to file suit within six months. However, for two reasons, that conclusion simply does not follow.

First, it assumes that Congress *intended* such delays to continue and become an integral part of the statutory scheme rather than to have such delays eliminated. In other words, the EEOC's argument is that Congress was aware of the horrendous one and two year delays and set up an enforcement procedure which deliberately *incorporated* those delays into the statutory scheme by giving the EEOC forever to sue.

Yet the legislative history discussed above conclusively demonstrates that, to the contrary, far from incorporating these delays, Congress was *appalled* by them and was determined to *eliminate* them. Thus, definite time limitations were placed both on charging parties and on the federal district courts, and the 180-day limitation was imposed as a guarantee that the EEOC would perform its responsibilities expeditiously just as charging parties and the federal district courts were required to do.[40] After all, this statute was

[40]Judge Moore made precisely this point in his dissent in *EEOC v. Louisville & Nashville R.R.*, 505 F.2d 610, 618-19 (5th Cir. 1974), *cert. denied*, 423 U.S. 824 (1975):

> "There is no doubt that Congress was well aware of both the average time necessary to process complaints and of the backlog which was confronting the Commission at the time of the 1972 amendments. But to conclude that Congress could therefore not have intended to impose a time limit on the Commission seems to me erroneous. A stronger inference is that Congress intended to expedite the administrative process and to eliminate the interminable delays which had previously been the rule. The entire thrust of section 706(f)(1) is toward increased efficiency."

designed to deal not simply with the situation as it existed in 1972, but, much more importantly, with the many years to follow. Thus, it is wholly incongruous to think that Congress would have been so shortsighted as to build into this enforcement scheme for years to come the very delays which it considered intolerable.

Second, several parts of the statutory scheme demonstrate a specific Congressional determination to *alter* rather than to incorporate past EEOC practices and to require prompt EEOC handling of charges. For example, there is no question that prior to the 1972 amendments, the EEOC's "reasonable cause" determination had frequently taken a year or more from the time the charge was first filed. Nevertheless, Congress specifically provided in Section 706(b) of the Act,

> "The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, *not later than one hundred and twenty days* from the filing of the charge . . . ." [Emphasis added].

Of course, this Congressional command was completely at odds with the EEOC's existing practice. Yet Congress, rather than incorporating the existing practice into the new statute, expressly directed the EEOC to *abandon* that past practice and make its determination within 120 days wherever practicable.[41]

[41]This section also shows that Congress knew how to use words affording the EEOC a flexible deadline when such was deemed appropriate.

Having thus established that the reasonable cause determination should normally be made within 120 days, it is inconceivable that Congress would have intended to permit the EEOC thereafter to take two or three years or whatever to attempt to conciliate the matter before filing suit. The 120-day provision is made a nullity unless the EEOC is required to act on its 120-day reasonable cause determination within a reasonable time thereafter, *i.e.*, within the next 60 days—for a total of 180 days.

Indeed, the conclusion that 60 days is normally a reasonable conciliation period is *expressly* confirmed by the provision in Section 706(f)(1) which states that:

> "Upon request, the court may, in its discretion, stay further proceedings for *not more than sixty days* pending . . . further efforts of the Commission to obtain voluntary compliance." [Emphasis added].

That provision establishes two significant points. First, the provision proves a Congressional awareness that court actions might have to be filed by the EEOC prior to the completion of its conciliation efforts in order to comply with the 180-day limitation, and thus affords the EEOC an additional 60 days if necessary after the suit is filed. Second, Congress obviously was convinced that 60 days was more than an adequate time for reasonable conciliation efforts, for Congress expressly *forbade* the court to delay action for more than 60 days of conciliation. Where Congress refused to permit a federal court to stay processes for more than 60 days for conciliation efforts, how can it be seriously argued that Congress nevertheless intended to allow the EEOC to take several years?

It is also highly significant that combining these two Congressional directives—120 days for the reasonable cause determination and 60 days for conciliation—yields the 180-day period here in question. This clearly demonstrates Congress' determination that the EEOC complete its two steps within 180 days and either exercise its discretion to sue or relinquish that right to the charging party. Of course, if the EEOC has not yet completed its conciliation efforts by the 180th day, Congress provided the EEOC with the opportunity to file suit and then continue conciliation for 60 days. This synchronization of the 120-day reasonable cause provision and the 60-day conciliation provision into a 180-day right to sue limitation cannot be disregarded as simply coincidental.

Another statutory provision demonstrating Congress' intention to alter rather than to incorporate the existing patterns of delay is Section 706(f)(5), which requires the federal district court to "cause the case to be in every way expedited." Of course, as previously noted, this is a legitimate imposition on the court's time and resources *if* the matter is brought to court promptly within the EEOC's 180-day time period. Yet if the EEOC is permitted to take three and a half years, as it did here—or forever, as the EEOC argues—the imposition on the court's time and resources becomes wholly unjustified. It is simply inconceivable that Congress would have expected the courts to act so expeditiously—altering rather than applying normal case handling procedures—unless Congress also intended that the EEOC too would have to abandon its past practice of delays and bring the matter to court within 180 days.

In short, we have an elaborate statutory procedure intended to alter existing practices and which imposed substantial burdens and strict time limits upon aggrieved parties and on the court. The issue here presented is whether Congress also imposed a time limitation on the EEOC as well. In a statutory enforcement scheme which depends on all three parties for success, it is inconceivable that only two parties are required to proceed expeditiously, particularly where the interminable delay by the third party effectively nullifies any expeditious action by the other two. Either the EEOC is the only party in this process which has no obligation to act in an expeditious manner, or the 180-day provision is that limitation.

4. Furtherance of the Statutory Purposes.

The EEOC insists, however, that an interminable right to sue is more consistent with the Act's remedial purposes than a 180-day time limitation. Yet it is apparent that just the opposite is true. With a 180-day time limitation, the EEOC would be forced to act promptly on behalf of aggrieved parties. Procedures would be streamlined, investigation and conciliation efforts expedited, and marginal claims weeded out. Aggrieved parties would be *guaranteed* EEOC action on their behalf within six months of the day they filed their claims and thus would be encouraged to file their claims, for the EEOC would either file suit on their behalf by the 180th day or provide them notice at that time advising them of their "right to sue" on their own behalf.

However, with no such time limitation, the EEOC has no incentive to expedite its handling of charges. The EEOC can—and obviously does—take as long

as it wants to, doing a great disservice not only to aggrieved parties but to respondents as well. While the EEOC obviously has an administrative desire for an interminable period in which to file suit, what purpose of Title VII is served by permitting—indeed, encouraging—such delay? Far from increasing compliance with the Act, such delays simply lessen the likelihood that aggrieved persons will turn to the EEOC for relief.

Indeed, one shocking fact in the case at bar—which simply exemplifies the EEOC's total disdain for the Congressional directives in Section 706—is that despite the explicit statutory language that if the Commission has not filed suit within 180 days it "*shall* so notify the person aggrieved," the EEOC has not yet done so in this case (A. 4), and routinely does *not* do so in any case unless specifically requested to do so.[42] That failure is significant for three reasons.

First, by routinely failing or refusing to advise charging parties of their right to sue, the EEOC has effectively nullified one-half of the enforcement machinery Congress set up, which is a very significant half given the charging party's ability to obtain a court-appointed lawyer and collect reasonable attorneys' fees if he or she prevails. Sections 706(f)(1) & (k). In short, the EEOC has simply substituted its judgment for the judgment of Congress by conferring upon itself an interminable right to sue, to the exclusion of notifying the aggrieved party of his or her right to sue.

Second, by ignoring the unequivocal statutory directive to advise the aggrieved party of his or her

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[42]B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 776 (1976).

right to sue after 180 days, the EEOC has cleverly enlarged its own right to sue, for had the statutory notice been sent and the charging party filed suit, the EEOC would have been limited to the restricted right to intervene discussed above and would not have been able to pursue matters beyond the charging party's charge.[48] This deliberate circumvention of the statutory limitation on the EEOC's right to intervene simply confirms the necessity of terminating the EEOC's right to sue on its own after 180 days, for without such a limitation the EEOC can and obviously will make a nullity of its limited right to intervene.

Finally, the EEOC's admitted failure to send this notice is made all the more ironic by the fact that the EEOC insists that sending such notice is all that the 180-day language of Section 706 requires the EEOC to do. Thus, the EEOC's very own practice rejects the interpretation of the Act which the EEOC would have this Court accept. In short, the EEOC's practice amounts to a determination by administrative fiat that the statutory 180-day language has no meaning at all and is therefore deleted.

5. A 180-Day Limitation Will Not Prejudice the Enforcement of Title VII.

All of the foregoing amply demonstrates the Congressional intention that the EEOC must sue within 180 days, and this Court should so hold. Such a holding will expedite the processing of all EEOC charges, without any risk that continuing discrimination will go undetected or unremedied. That is because *even if* the EEOC gives notice to the charging party rather

[48] *Van Hoomissen v. Xerox Corp.*, 497 F.2d 180 (9th Cir. 1974).

than suing, and *even if* the charging party decides not to sue, the EEOC is still able to proceed. Section 706(b) permits EEOC Commissioners to file charges on their own, and also permits persons to file charges on behalf of other persons, provisions which assure that ongoing discrimination can be remedied or litigated by the EEOC at any time.

Thus, a holding that the 180-day provision constitutes a time limitation on when EEOC can file suit on a specific underlying charge does not create any risk that ongoing discrimination will go unremedied, for as this Court recently stated in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 467 n.13 (1975), in finding a civil rights action under the Civil Rights Act of 1870 to be barred by a one-year state statute of limitations,

> "We note expressly how little is at stake here. We are not really concerned with the broad question whether these respondents can be compelled to conform their practices to the nationally mandated policy of equal employment opportunity. If the respondents, or any of them, presently are actually engaged in such conduct, there necessarily will be claimants who are in a position now either to file a charge under Title VII or to sue under § 1981. The question in this case is only whether this particular petitioner has waited so long that he has forfeited his right to assert his § 1981 claim in federal court."

In summary, the remedial purposes of the Act will obviously be far better served by prompt EEOC action on many charges rather than dilatory EEOC action on all charges. The statutory enforcement scheme and

the legislative history are both replete with evidence that Congress was convinced that it is the *imminence* of court action rather than the remoteness of court action which induces compliance with the Act. Unless the 180-day provision is found to constitute a federal limitation on when the EEOC can sue, the undeniable Congressional insistence on prompt EEOC action will be obliterated.

C. Assuming Arguendo That the 180-Day Provision Does Not Constitute a Federal Limitation Period on the EEOC's Right to Sue, the Most Analogous State Limitation Period Is Applicable.

If the Court somehow concludes that Congress provided no federal limitation on the EEOC's right to sue, judicial authority and legislative history require the application of the most analogous state limitation period rather than no limitation period at all.

1. General Principles.

Many federal statutes contain no limitation period, and thus this Court has repeatedly held that suits filed under such statutes are governed by the most analogous state limitation period:

Civil Rights of 1870.[44]
Civil Rights Act of 1871.[45]
Labor Management Relations Act.[46]
Sherman Antitrust Act.[47]

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[44]*Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975).

[45]*O'Sullivan v. Felix*, 233 U.S. 318, 322-24 (1914).

[46]*Autoworkers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 701-05 (1966).

[47]*Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U.S. 390, 397 (1906). A federal statute of limitations for suits brought under the antitrust laws was enacted by Congress in 1955. 15 U.S.C. §§15b, 16 (1970).

National Bank Act.[48]
Patent Act.[49]
Act of February 26, 1845 (re custom duties).[50]

This rule was most recently applied by this Court in 1975 in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 464 (1975), wherein the Court applied the one-year Tennessee state statute of limitations to a complaint under the Civil Rights Act of 1870, making clear that there is nothing "peculiar to a federal civil rights action that would justify special reluctance in applying state law."

Furthermore, the appellate courts have applied state limitation periods to other federal statutes which contained no federal limitation period:

Civil Rights Act of 1964.[51]
Railway Labor Act.[52]
Labor Management Reporting and Disclosure Act of 1959.[53]
Clayton Antitrust Act.[54]

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[48]*Cope v. Anderson*, 331 U.S. 461, 463 (1947); *Rawlings v. Ray*, 312 U.S. 96, 97-98 (1941); *Pufahl v. Estate of Parks*, 299 U.S. 217, 225 (1936).

[49]*Campbell v. Haverhill*, 155 U.S. 610, 613-18 (1895).

[50]*Barney v. Oelrichs*, 138 U.S. 529, 530 (1891).

[51]*EEOC v. Griffin Wheel Co.*, 511 F.2d 456, 458-59, *aff'd on rehearing*, 521 F.2d 223 (5th Cir. 1975); *United States v. Georgia Power Co.*, 474 F.2d 906, 923 (5th Cir. 1973).

[52]*Jones v. Trans World Airlines*, 495 F.2d 790, 799 (2d Cir. 1974).

[53]*Sewell v. Grand Lodge of Int'l Ass'n of Machinists and Aerospace Workers*, 445 F.2d 545, 548-49 (5th Cir. 1971), *cert. denied*, 404 U.S. 1024 (1972).

[54]*Englander Motors, Inc. v. Ford Motor Co.*, 293 F.2d 802, 804-07 (6th Cir. 1961); *Williamson v. Columbia Gas & Elec. Corp.*, 27 F. Supp. 198 (D.Del.), *aff'd*, 110 F.2d 15 (3d Cir. 1939), *cert. denied*, 310 U.S. 639 (1940).

Securities Exchange Act of 1934.[55]
Communications Act of 1934.[56]
Investment Company Act of 1940.[57]

Thus, the rule that a state limitation period is applied where no federal limitation period exists is firmly embedded in our jurisprudence, and with good reason, the most basic of which stems from an elemental sense of due process, best summarized by Chief Justice John Marshall's statement in 1805 that an absence of some statute of limitations "would be utterly repugnant to the genius of our laws." *Adams v. Woods,* 6 U.S. (2 Cranch) 336, 342 (1805). Were it otherwise, quite obviously defendants would be unfairly and prejudicially subjected to potentially massive financial liabilities dating back many years prior to the filing of the suit in question—liabilities mounting year after year for an undefinable period of time on the basis of claims the nature and extent of which are often unknown and thus not ones against which defendants may protect themselves.

Second, statutes of limitation are designed to protect both the courts and defendants from stale claims which depend on evidence and witnesses the availability and reliability of which have been impaired by the passage of time. *See, e.g., Campbell v. Haverhill,* 155 U.S. 610, 617 (1895).

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[55]*Richardson v. MacArthur,* 451 F.2d 35, 39 (10th Cir. 1971); *Douglass v. Glen E. Hinton Invest., Inc.,* 440 F.2d 912, 914 (9th Cir. 1971); *Klein v. Bower,* 421 F.2d 338, 343 (2d Cir. 1970); *Morgan v. Koch,* 419 F.2d 993, 996-97 (7th Cir. 1969).

[56]*Bufalino v. Michigan Bell Tel. Co.,* 404 F.2d 1023, 1028 (6th Cir. 1968), *cert. denied,* 394 U.S. 987 (1969).

[57]*Esplin v. Hirschi,* 402 F.2d 94, 101 (10th Cir. 1968) *cert. denied,* 394 U.S. 928 (1969).

Third, given the well-established rule that state limitation periods will be applied in the absence of a federal limitation period, it is far more reasonable to assume that Congress intended that rule whenever a federal limitation period was omitted than it is to presume that Congress intended the right to sue to be interminable. Hill, *State Procedural Law in Federal Nondiversity Litigation,* 69 HARV. L. REV. 66, 78-81, 91-92 (1955), and cases cited therein. This is particularly true in the instant case, where the Congressional concern for prompt action is so evident and pervasive.

2. The Only Exception to This Rule Has Been Where the United States Government Was Suing to Collect Revenue for the United States Treasury or to Prevent Injury to the United States Government Itself.

The few decisions of this Court which refuse to apply the most analogous state limitation period to a suit by the United States Government invariably do so because the United States is suing as a sovereign to protect its rights *as a sovereign, i.e.,* to collect money for the United States Treasury or to prevent an injury to the United States Government itself. *E.g., United States v. Summerlin,* 310 U.S. 414 (1940) (United States attempting to enforce its own claim against an estate); *Davis v. Corona Coal Co.,* 265 U.S. 219 (1924) (United States suing to enforce claims which arose during United States' operation of railroads); *United States v. Dalles Military Road Co.,* 140 U.S. 599 (1891) (United States suing to recover land it had granted); *United States v. Nashville, Chattanooga & St. Louis Railway Co.,* 118 U.S. 120 (1886) (United States suing to collect on bonds owned by the United States); *United States v. Thompson,* 98 U.S. 486 (1879)

(United States seeking recovery of funds embezzled from its Treasury).

However, whenever the United States Government has sued on behalf of private individuals, this Court has held that the most analogous state limitation period is applicable to the Government's suit. *United States v. Beebe,* 127 U.S. 338 (1888); *Curtner v. United States,* 149 U.S. 662 (1893); *United States v. Des Moines Navigation & R.R. Co.,* 142 U.S. 510 (1892).

Thus, the distinction presented by these Supreme Court decisions is *not*—as the EEOC has asserted and the Ninth Circuit implied—whether the government's suit serves a "public interest" or a "private interest." Rather, as the Fifth Circuit held in *United States v. Georgia Power Co.,* 474 F.2d 906 (5th Cir. 1973), and *EEOC v. Griffin Wheel Co.,* 511 F.2d 456 (5th Cir.) *aff'd on rehearing,* 521 F.2d 223 (5th Cir. 1975), the distinction is based on whose rights are being asserted or protected by the lawsuit: the sovereign's rights or the citizens' rights?[58]

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[58]As the Fifth Circuit explained in *Georgia Power,* 474 F.2d at 923, quoted and followed in *Griffin Wheel,* 511 F.2d at 458-59:

> "Where the government is suing to enforce rights belonging to it, state statutes of limitation are not applicable. *See e.g.,* United States v. Thompson, 98 U.S. 486, 488-491, 25 L.Ed. 194 (1878) and United States v. Summerlin, 310 U.S. 414, 416-417, 60 S.Ct. 1019, 84 L.Ed. 1283 (1940). However, this principle is not apropos to the present back pay claims. Insofar as the pattern or practice suit constitutes a proper legal conduit for the recovery of sums due individual citizens rather than the treasury, it is a private and not a public action. *Cf.* United States v. Beebe, 127 U.S. 338, 346, 8 S.Ct. 1083, 32 L.Ed. 121 (1888), and United States v. Smelser, 87 F.2d 799 (5th Cir. 1937). These personal claims are entitled to no superior status because they are here allowed to be asserted in the Attorney General's suit as well as in the private class action."

United States v. Beebe, 127 U.S. 338 (1888), is the best illustration of this distinction. In that case, the United States was suing at the behest of aggrieved parties to invalidate patents for land which were alleged by them to have been fraudulently obtained. The Supreme Court held that the United States Government had the right to bring suit—despite the absence of any federal statute authorizing suit—because of the obvious public interest in preventing persons from obtaining and utilizing fraudulently obtained patents. Nevertheless, the Court found the state limitation period applicable to the government's right to sue because the suit, even though maintained in the public interest, sought recovery for private citizens rather than for the United States Government itself; thus, those private citizens rather than the United States were the real parties in interest:

> "The bill itself was filed in the name of the United States, and signed by the attorney general, on the petition of private individuals; and *the right asserted is a private right,* which might have been asserted without the intervention of the United States at all." [Emphasis added].

127 U.S. at 346.

This Court's decisions, therefore, simply do not support the conclusion that a state limitation period is inapplicable whenever a public interest may be served by the lawsuit, for obviously there was a compelling public interest in eliminating fraudulently obtained patents in the *Beebe* case. That generalized notion of public interest has never been considered sufficient to exempt the government from a state limitation period where the lawsuit itself was one seeking monetary

recovery for private citizens rather than for the government itself. Thus, *no Supreme Court decision to date* has ever found the United States Government or one of its agencies to be immune from the state limitation period where the government or agency was suing to collect money on behalf of private individuals, and it would be completely inconsistent with the trends of modern law suddenly to expand the doctrine of sovereign immunity to encompass such suits.

Accordingly, this Court's recent comments in *Franks v. Bowman Transportation Co., Inc.*, 44 U.S.L.W. 4356, 4365 n.40 (1976), and *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975), concerning the public purpose served by back pay awards in Civil Rights Act cases do not serve to bring such lawsuits within any existing exception to the rule that state limitation periods are applied in the absence of a federal limitation period, as *Johnson v. Railway Express Agency, Inc.*, certainly established. Applying the same limitation period in such cases as is applied in all other analogous actions in California "would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination,"[59] for as the Court stated in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 464 (1975), there is nothing "peculiar to a federal civil rights action that would justify special reluctance in applying state law."

Finally, it is to be noted that could there otherwise have been any question about it, Congress expressly provided by statute that in actions brought under Title

[59] *Albemarle Paper Co. v. Moody*, 422 U.S. at 421.

VII, the federal courts should rely on state laws in the absence of applicable federal laws.[60] That statute demonstrates that Congress, far from seeking to immunize Civil Rights Act suits from state statutory provisions, deliberately intended to have state provisions applied in the absence of federal provisions.

3. The Ninth Circuit's NLRB Analogy.

The Ninth Circuit, however, refused to apply the state limitation period to the EEOC's complaint. It grounded its conclusion on the theory that EEOC enforcement procedures are analogous to National Labor Relations Board (hereinafter "NLRB") enforcement procedures and thus the EEOC should be treated the same as the NLRB insofar as state statutes of limitation are concerned—a theory not even argued by the EEOC to that Court. Yet even assuming that this Court were to conclude that state limitation periods are inapplicable to NLRB court actions—an issue not yet decided by

[60] Title VII, 42 U.S.C. §§ 2000e *et seq.* (1976), is part of Chapter 21 of Title 42. Also part of Chapter 21 is a provision which appears at 42 U.S.C. § 1988 (1976), which provides, in relevant part:

> "Proceedings in Vindication of Civil Rights.
>
> The jurisdiction . . . conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States . . . but in all cases where they . . . are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and *statutes of the State* wherein the court having jurisdiction of such civil . . . cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, *shall be extended to and govern* the said courts in the trial and disposition of the cause. . . ." [Emphasis added].

this Court[61]—that conclusion cannot properly be extended to the EEOC, for the enforcement procedures of the two agencies are radically and deliberately different.

The key distinction in the procedures of the two agencies is that the EEOC *must* file its complaint in the federal district court before any legally cognizable adjudication occurs. By contrast, the NLRB *never* has to file a complaint in the federal district court as part of its normal enforcement procedure; rather, the NLRB issues its own complaint and the NLRB has been given full authority to adjudicate cases in lieu of, and in effect as, the federal district court. Thus, the only time the NLRB goes to federal court is to the appellate level.[62] Obviously, statutes of limitation have never been thought to apply either to internal agency procedures or to appeals; they are applicable to the filing of a complaint in court, an act which the EEOC *must* do and the NLRB need *never* do. There is, in short, simply no "complaint" that a statute

[61]Neither of the cases cited by the Ninth Circuit to support its conclusion that state limitation periods are inapplicable to NLRB complaints is a Supreme Court decision, and in neither case was the statute of limitations argument directed at the NLRB's delay in filing its complaint. For all that appears in either decision, the NLRB's complaint issued within a reasonable time after the charge was filed, and the attack was directed at the NLRB's delay after its complaint had been issued. Of course, statutes of limitation have always been directed at the timeliness of the filing of the complaint, not the pace of events thereafter. Therefore, while there are certainly dicta in both lower court decisions to support the conclusion that state limitation periods are inapplicable to the filing of NLRB complaints, neither case squarely so held.

[62]The only exception is a suit by the NLRB in federal district court to obtain preliminary injunctive relief pending completion of the adjudicative process before the NLRB itself. 29 U.S.C. §§ 160(j) & (l) (1970).

of limitations could apply to insofar as the NLRB is concerned.

This criticial distinction between the NLRB enforcement procedure and the EEOC enforcement procedure is all the more significant because of the *deliberate* Congressional decision to withhold from the EEOC the authority which the NLRB has always enjoyed. As discussed above, extensive efforts were made in Congress in 1972 to give the EEOC full NLRB-type cease and desist enforcement authority, and those efforts were rejected by Congress in favor of the present requirement that the EEOC initiate its enforcement efforts by the filing of a complaint in the federal district court. Thus, to hold the enforcement procedures of the two agencies to be analogous is to ignore the express Congressional refusal to give the EEOC the same enforcement authority it has given the NLRB.

The NLRB analogy is thus totally inapposite.

4. Conclusion Regarding State Limitation Period.

The foregoing thus makes clear that at least insofar as the EEOC's complaint seeks to collect back pay for private individuals, that portion of its complaint is barred by the state limitation period.[63] However, for the reasons set forth below, Petitioner submits that the state limitation period should *also* be applied to

[63]*Accord: EEOC v. Griffin Wheel Co.*, 511 F.2d 456, 459 (5th Cir. 1975), and *United States v. Georgia Power Co.*, 474 F.2d 906, 923 (5th Cir. 1973), *followed in Watkins v. Scott Paper Co.*, 530 F.2d 1159, 1195-96 (5th Cir. 1976); *United States v. Masonry Contractors Ass'n of Memphis, Inc.*, 497 F.2d 871, 877 (6th Cir. 1974); *EEOC v. Eagle Iron Works*, 367 F. Supp. 817, 823-24 (S.D. Iowa 1973); *EEOC v. Christianburg Garment Co., Inc.*, 376 F. Supp. 1067, 1071-73 (W.D. Va. 1974).

that portion of the EEOC's suit which seeks injunctive relief as well.[64]

First, *Johnson v. Railway Express Agency, Inc.* applied the state limitation period to *both* the injunctive relief and the back pay parts of the plaintiff's suit. *See Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975).

Second, even in its request for injunctive relief, the EEOC is not seeking to prevent an injury to the United States Government itself, but rather to private citizens, so that the existing exception set forth in the Supreme Court decisions discussed *supra* pages 37-41 does not bar application of the state limitation period to the request for injunctive relief.

Third, no prejudice results from applying the state limitation period to the request for injunctive relief, because "there necessarily will be claimants who are in a position now either to file a charge under Title VII or to sue under §1981." *Johnson v. Railway Express Agency, Inc.*, 421 U.S. at 467 n.13. In this respect, it is critical to recognize that charges may be filed not only by any aggrieved party, but also by any Commissioner of the EEOC or by any person on behalf of a person claiming to be aggrieved. Section 706(b). Thus, if the EEOC now has a stale claim it would still like to pursue, one of the EEOC's own Commissioners can simply file a new charge and begin the enforcement machinery anew, with far greater chance for success given the relative freshness of the available evidence of noncompliance, if any there be, but without the unconscionable prejudice to the respondent which would otherwise occur by proceeding on an old and stale charge.

[64]Contrary to the holding below and the Fifth Circuit's holding in *Griffin Wheel*, 511 F.2d at 459.

There is, therefore, simply no reason to permit the EEOC to proceed on what is now a seven-year-old claim. If the unlawful practices have been corrected, the Act's purposes have been fulfilled without the necessity of litigation. On the other hand, if any unlawful practice continues, the EEOC can proceed on a timely rather than a stale charge with far greater likelihood of vindicating the purposes of Title VII.

Conclusion.

There is absolutely no basis—legislative history, statutory scheme, fundamental fairness — on which this Court can reasonably conclude that Congress intended the EEOC's right to sue to be interminable. Accordingly, for the reasons set forth in detail above, this Court must conclude that either the 180-day federal limitation period or the most analogous state limitation period applies to the EEOC's right to sue under Title VII.

Dated: January 25, 1977.

Respectfully submitted,

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Attorneys for Petitioner.

IN THE

Supreme Court of the United States

October Term, 1976
No. 76-99

OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA,

Petitioner,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

Excerpts from

SENATE SUBCOMM. ON LABOR OF THE COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG., 2D SESS., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972.

(Comm. Print 1972)

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MINORITY VIEWS ON H.R. 1746

We all agree that, if equal employment opportunity for all Americans is to become a reality, the Equal Employment Opportunity Commission should be given enforcement powers. We are convinced, however, that H.R. 1746 will not accomplish this goal, and thus we must oppose it.

First and foremost, on the premise that anyone charged with violating the law is innocent until proven guilty, we believe that enforcement of our laws can best be effectuated through our courts.

Additionally, we fear that, in view of the estimated 18-month to two-year backlog that currently exists at the EEOC, the intent of H.R. 1746 to expand the EEOC's jurisdiction will serve only to retard and frustrate the purposes and objectives of the Equal Employment Opportunity Act.

Under the procedures of the Committee bill, upon receipt of a charge, the Commission is required to investigate and to find reasonable cause before issuing a formal complaint. In effect, this finding is a presumption of the guilt of the defendant, which subtly shifts the burden of proof from the plaintiff to the defendant. Thus, in practice, if not by law, the defendant is faced with the burden of proving his innocence.

During Committee sessions, we offered amendments to assure that title VII of the Civil Rights Act would be enforced, and that enforcement would be fair and impartial. Our amendments, which were rejected, would permit the EEOC attorneys, if they are unsuccessful in their conciliation and if they found reasonable cause to believe that a violation of the law has taken place, to seek enforcement in Federal district courts.

I. The Major Issue

As indicated above, the most significant issue that separates the majority of the committee from the minority is not whether the EEOC should be given enforcement authority. Rather, the issue is: What procedures will insure the most effective enforcement of the substantive provisions of title VII of the Civil Rights Act of 1964.

By providing the EEOC with authority to issue cease and desist and other remedial orders, the Committee bill would transform this agency into a quasi-judicial body very similar to the National Labor Relations Board.

In the next section we explain and justify our belief that the court approach will be more effective and more expeditious than the administrative approach. We are compelled, however, to point out as well that the authority provided in H.R. 1746 ignores and denies basic American principles.

Under our system of justice, a person charged with violating the law is presumed innocent until proved guilty. In practical effect the Committee bill creates a system that presumes persons charged with certain law violations are guilty until proved innocent. We contend that the EEOC has attained an image as an advocate of civil rights, and properly so. For this very reason, we submit that it cannot be an impartial arbiter of the law. An advocate, by nature, represents one side of an issue. How can he then be asked to apply the law without prejudice?

THE JUDICIAL APPROACH

The direct judicial approach offers greater advantages than the administrative cease and desist approach. While both methods would involve an adversary proceeding before a finder of fact, in the judicial approach the original finder of fact would be the federal district court judge as compared to a hearing officer who is a civil service employee, under the administrative approach.

There are substantial reasons for supporting direct resort to the courts. They include:

A. Timeliness of Relief and Remedy

Contrary to the proponents of the "cease and desist" approach, the district court approach is clearly preferable because relief can be more quickly granted. The pertinent yardstick is the amount of time an aggrieved person must wait before he is afforded relief. Empowering the EEOC to bring court suits will greatly facilitate its ability to implement the law without delay and to bring effective relief to victims of discrimination. If the EEOC prevails before the court, it is entitled to an immediate injunction and other relief to bring about a rapid end to the discriminatory practices. In many instances a relatively simple proof would allow the EEOC to obtain a preliminary injunction pending a full trial of the case.

A close examination of the time factors involved in processing charges before the National Labor Relations Board (which was the model for formulating the enforcement powers given to the EEOC by the Committee bill) and the district courts conclusively establishes that quicker relief can be achieved when the direct court approach is utilized.

It is significant that the Special Subcommittee on Labor opened hearings on May 6, 1971, on a bill (H.R. 7152) to expedite the processes of the National Labor Relations Board, and in the explanatory sheet it distributed it discussed the delay incurred in the six stages of the administrative process which culminated in a court enforced order in the Court of Appeals. The delay was summarized as follows:

> In sum, it can easily take 2½ years from the time a worker walks into a regional Labor Board office with a charge that he has been discharged illegally until the time a court of appeals finally issues an order that he be reinstated to his job with back pay.

Even the 2½ year figure cited appears unduly optimistic in light of recent testimony given before the Special Subcommittee on Labor on

H.R. 7152, on May 12, 1971, by Frank W. McCulloch, former Chairman of the NLRB, about the length of delay between the issuance of a Board decision and a court order. He stated:

> In operation, the lack of such a provision [referring to a self-enforcing provision] has resulted in the build-up of a median time interval of 630 days in enforcement cases, as previously noted, from Board decision to a Court order which for the first time applies the sanctions of the law to a non-complying respondent.

When these time factors are added up, the 18–24 month backlog currently existing at EEOC, the time needed for an administrative proceeding and review by the Commission, plus the 630 day figure currently required to get court enforcement (using the NLRB figure), 3½ to 4 years would appear to be a more correct approximation of the time involved in getting enforcement through the administrative cease and desist approach.

In striking contrast, the 1970 Annual Report of the Director of the Administrative Office of the United States Courts states that ten months was the median time interval from issue to trial for non-jury trials completed in United States District Courts in 1970. Even assuming time for issuance of a decision such forum would clearly be quicker. Moreover, the district courts located in those states which have most of the charges of employment discrimination often have better time records in case handling.

An examination of the Fourth Annual Report of the Equal Employment Opportunity Commission, submitted on July 30, 1970, shows that the top ten states in terms of the number of charges of employment discrimination recommended for investigation are: Texas (1232 charges), Louisiana (1007), Florida (1000), Alabama (734), Tennessee (672), California (546), Georgia (519), Pennsylvania (501), Illinois (334) and New Jersey (306). As federal district courts in such metropolitan areas as New York City and Philadelphia would obviously be much busier than those in less populolus areas, the case handling time factor should therefore, be correlated with the areas where most charges originate.

The median time interval in months for non-jury trials in such states discloses the following:

Texas:
- Northern District, 4 months, Dallas.
- Eastern District, 5 months, Beaumont.
- Southern District, 12 months, Houston.
- Western District, 3 months, San Antonio.

Louisiana:
- Eastern District, 13 months, New Orleans.
- Western District, 13 months, Shreveport.

Florida:
- Northern District, 8 months [1], Tallahassee.
- Middle District, 12 months, Jacksonville.
- Southern District, 9 months, Miami.

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[1] Jury and non-jury trials total.

Alabama:
Northern District, 8 months, Birmingham.
Middle District, 3 months,[1] Montgomery.
Southern District, 11 months, Mobile.
Tennessee:
Eastern District, 4 months, Knoxville.
Middle District [2], Nashville.
Western District, 8 months, Memphis.
California:
Northern District, 23 months, San Francisco.
Eastern District, 21 months,[1] Sacramento.
Central District, 10 months, Los Angeles.
Southern District [3], San Diego.
Georgia:
Northern District, 4 months, Atlanta.
Middle District, 4 months, Macon.
Southern District, 1 month, Savannah.
Pennsylvania:
Eastern District, 36 months, Philadelphia.
Middle District, 21 months [1], Scranton.
Western District, 12 months, Pittsburgh.
Illinois:
Northern District, 11 months, Chicago.
Eastern District, 12 months [1] East St. Louis.
Southern District, 11 months [1], Peoria.
New Jersey: 1 month, Newark.

Of the 29 district courts represented in the above statistics, 21 courts had a median time of 12 months or less; 8 courts had median trial completion times of 6 months or less.

In hearings last April before the House Committee on Appropriations, discussing the EEOC budget request for FY 1971, Chairman Brown noted that EEOC's backlog "now means an average delay of 18 months to 2 years before the Commission can complete action on a complaint." How much longer would this interval be extended if at the end thereof, the Commission then had to begin its administrative proceedings followed by resort to the appellate courts? In his testimony before the General Subcommittee on Labor recently, Chairman Brown noted that "during the first seven and a half months of this Fiscal Year, 14,644 charges were filed with the Commission, *a number greater than the number received in all of last Fiscal Year.*" (Emphasis supplied.) He also stated that as of February 20, 1971, the backlog of charges pending before the Commission numbered 25,195.

The increased caseload and backlog of EEOC alone not only undermines but clearly refutes the contention that the administrative process would bring quicker relief. Add to this backlog the increased workload that would be generated by the additional jurisdiction bestowed on EEOC by the Committee bill (jurisdiction over state and local

[1] Jury and non-jury trials—total.
[2] No figure given: only one jury trial reported completed in fiscal year 1970.
[3] No figure given: only one jury trial reported completed in fiscal year 1970.

employees, transfer of the Office of Federal Contract Compliance to EEOC, transfer of pattern and practice suits to EEOC from the Justice Department, transfer of authority over discrimination among federal employees to EEOC from the Civil Service Commission, jurisdiction extended to employers with 8 employees as compared to the present 25 employee limitation) conclusively establishes that claims of quicker remedies through the administrative "cease and desist" process are more fiction than fact.

Finally, we suggest that a further impediment to timely action is presented by virtue of the fact that under the administrative approach the decision to grant relief can be made only by the Commission. An EEOC attorney in the field could investigate, and he could attempt conciliation; but there would be only one facility available to issue a cease and desist order—the Commission in Washington. Through the judicial approach, EEOC attorneys would have access to our 93 Federal district courts for enforcement.

It seems eminently more sensible to us to proceed in a forum where not only can preliminary relief be made available at the outset, but, if circumstances warrant, further relief can be obtained as the case proceeds, with *permanent relief* embodied in a self-enforcing decree issuing at the culmination of trial. Thus we will have avoided the multiplicity of opportunities for delay that are inherent in the cease-and-desist approach, and aggrieved parties will have their remedy at the earliest possible moment.

This alternative saves the best features of the independent agency approach—expertise and political autonomy—while avoiding the problems that arise when an active enforcement stance must be accommodated within a structure that contemplates quasi-judicial neutrality. The problem title VII seeks to correct is not one susceptible to the kind of policy balancing that is usual in the administration of law regulating utilities or other situations involving competing interests. Racial discrimination does not occupy the status of an "interest" under our system of law. It is a grave injustice which should be eliminated in as quick and efficient a manner as possible.

B. Greater Prestige of Federal Judges

The appropriate forum to resolve civil rights questions, questions of employment discrimination as well as such matters as public accommodations, school desegregation, fair housing, and voting rights, is a court. Civil rights issues usually arouse strong emotions. United States district court proceedings provide procedural safeguards; Federal judges are well known in their areas and enjoy great respect; the forum is convenient for the litigants and is impartial; the proceedings are public, and the judge has power to resolve the problem and fashion a complete remedy.

C. Evidentiary Matters

The district court approach has a great advantage over an administrative hearing procedure in securing the needed evidence. The Federal Rules of Civil Procedure, with respect to discovery, would greatly facilitate the collection of evidence for trial. Under a cease-and-desist approach, the rather cumbersome method of enforcing subpoenas severely inhibits the acquisition of evidence for trial, making the hearing

very dependent upon the investigation. Experience has shown that investigations, which are aimed simply at developing enough evidence to find reasonable cause, fall short of providing adequate evidence for obtaining a decision where the standard, as it is in the courts, is a preponderance of evidence on the record. Discovery procedures take less time than administrative fact-gathering techniques, and the contempt powers of the court operate to inhibit any intimidation of witnesses, which is a rather difficult problem that is often real, but seldom apparent.

II. Detrimental Provisions and Critical Omissions in the Committee Bill

A. As elaborated or hereafter, we conclude that those provisions in the Committee bill dealing with the transfer of the Office of Federal Contract Compliance (OFCC), the extension of EEOC jurisdiction to state and local employees, and the transfer of pattern and practice suits from the Justice Department to the EEOC are detrimental to the major objective of this bill, which is to provide an enforcement power to effectuate appropriate and timely remedies for discriminatory employment conditions.

1. Section 11 of the Committee bill would transfer the function of the Office of Federal Contract Compliance under Executive Order 11246 from the Department of Labor to the Equal Employment Opportunity Commission. We oppose this transfer because: OFCC has made commendable progress in achieving the Executive Order's goal of equal employment opportunity by government contractors; the transfer would create a hiatus in the administration of these crucial programs and add an insurmountable administrative burden to an already overburdened agency; and the administration of the programs will prove unworkable because the EEOC would be assuming a dual role of contract compliance and the regulatory function of processing complaints of employment discrimination.

OFCC is charged with the administration of the nondiscrimination and affirmative action provisions of the Executive Order which relate to Federal contractors and Federally-assisted construction contractors. We feel that this function falls logically within the Department of Labor. The present location of OFCC permits it to benefit directly from the experience gained by the Labor Department in the administration of other workplace standards and anti-discrimination programs which are enforced by similar sanctions as well as its general expertise in labor-management relations. The Department also includes the Manpower Administration, thus making it possible for OFCC to include job training efficiently in the development of useful affirmative action programs.

While OFCC and EEOC share the goal of promoting the civil rights of minority workers, the programs they are presently administering are considerably different. EEOC acts, following an individual complaint, to redress instances of actual job discrimination. OFCC works with Government contractors to insure equal employment opportunity. The merging of these two distinct functions in a single agency will create serious problems, and such combination will

undoubtedly work to the detriment of both programs. Incidentally, it should be pointed out, that once EEOC is given enforcement powers, federal contractors will be, just as other employers, subject to the processes and remedies of the EEOC in addition to those exercised by OFCC.

The EEOC presently has a tremendous backlog of pending charges. The addition of some form of enforcement powers will greatly increase its administrative responsibilities. We feel that it is simply unrealistic to expect EEOC simultaneously to shoulder the burden of OFCC's program. If the Committee's bill is enacted, we foresee a significant disruption of the compliance program. Regarding such transfer Chairman Brown of the EEOC appeared before the General Subcommittee on Labor and stated:

> Given the tremendous backlog of charges pending now with the Commission—25,195 as of February 20, 1971—the additioanl work which would have to be undertaken by the Commission if it gets enforcement powers, the difficulty of obtaining adequate funding for the Commission, and finally, the tremendous administrative difficulties embodied in such a transfer, I am doubtful as to the desirability of transferring OFCC at this time. Specifically, the administrative difficulties are by far the greatest in my view; almost insurmountable.

The primary responsibility for the implementation of the Executive Order as it relates to government procurement rests and must remain, with the individual Executive agencies. The coordination of the goals of equal employment opportunity with the needs of these agencies to obtain goods and services can be most effectively accomplished from within the Executive Branch of Government. Indeed, the experience of the various Presidential Committees formerly charged with the compliance program indicates the inherent difficulties in placing the operations of the agencies under the control of a separate body, such as the EEOC.

2. The Extension of Coverage to State and Local Employees. Apart from adding to the EEOC's already swollen workload which is treated in more detail in other portions of this report, we believe this area helps substantiate our earlier conclusion that the Federal courts are the proper forum. If its jurisdiction is thus extended, we will have the anomaly of a federal administrative agency interposing itself in the internal administration of state and local government. The NLRB does not have such jurisdiction over employees of state and local governments in matters involving discrimination in employment and we see no justification for extending such jurisdiction to the EEOC. It would be inconsistent with our system of division of governmental powers to subject state and local authorities to the cease-and-desist power of a federal commission.

3. Transfer of Pattern and Practice Suits to EEOC. We oppose the provisions of the Committee bill which would transfer from the Department of Justice to the EEOC the authority to try pattern and practice suits because it involves not only the transfer of authority from one agency to another, but also the elimination of the judicial remedies now provided by Section 707 of the Civil Rights Act. It will

unquestionably hinder the achievement of equal employment opportunity. In effect, the Committee bill, will merely delay the achievement of any remedy to groups of discriminatees by interposing yet another obstacle, the additional forum of the EEOC, which after reaching its conclusion in such matters, under its hearing and cease and desist procedures, must ultimately petition a Federal Circuit Court of Appeals for enforcement. Certainly, it is in this area, that suits are frequently initiated as class actions because of the numbers of employees involved and the amounts of backpay due, which will usually require the authority of a Court enforced decree.

Between July, 1965, when title VII took effect and April 2, 1971, the Civil Rights Division of the Department of Justice filed some 60 suits on the basis of Section 707. The Division has had a high degree of success in litigating these cases, and principles established in them, at the trial or appellate level, have been useful to complaining private litigants and to other federal agencies. Six Circuit Courts have rendered decisions favorable to the Division's position and to date the Division has prevailed in each pattern and practice suit that has come to final decision. Such a record warrants a retention of pattern and practice suits in the Department of Justice. Some of the reasons for its success are the fact that it has access to the investigative resources of the Federal Bureau of Investigation—resources which have proved invaluable in ascertaining the facts and marshaling them for evidence in pattern or practice suits. Moreover, the United States Attorneys, who are the Department's field representatives located in every judicial district in the nation, have a thorough knowledge of local situations and are in a position to render valuable counsel and assistance.

4. Recovery of Court Costs Limited to "Prevailing Plaintiff." Under existing law, the Court has the discretion to allow the "prevailing party" a reasonable attorney's fee as part of the costs for litigation proceeding under this title. The Committee bill eliminated the term "prevailing party" and substitutes the term "prevailing plaintiff". No justification for such change was presented in hearings on the bill; it is contrary to the rule in most jurisdictions; and it may constitute an incentive for harassment suits and a "disincentive" to respondents not to resist ill-founded claims.

B. Critical Omissions of the Committee Bill. At the subcommittee and committee levels, we attempted to amend the Committee bill because it lacked certain procedural and due process safeguards. These deficiencies include: failure to provide for a reasonable statute of limitations on backpay; failure to provide for service of a charge on the named respondent within a reasonable time; failure to provide that title VII, as amended, shall be the exclusive remedy. We believe these omissions are critical and should be called to the attention of the House for we expect to make further attempts on the House floor to provide minimal due process standards in the Committee bill.

1. Statute of Limitations. Under the Committee bill, the time period in which individual charges of employment discrimination must be filed has been extended from 90 days to 180 days from the date of the alleged discriminatory conduct; this is identical to the statute of limitations under the National Labor Relations Act. We concur in such extension. However, testimony in the hearings indicates that pattern or practice suits now brought by the Justice Department are not sub-

ject to such limitation. Civil suits in most jurisdiction are subject to statutes of limitations ranging usually between two or three years. Under existing law, recovery of backpay in such pattern or practice suits can extend back to 1965, the effective date of enactment of the Civil Rights Act of 1964. Thus potential respondents whether they be employers, labor organizations or employment agencies may be subject to enormous monetary penalties in the absence of a definite limitation. To avoid the litigation of stale charges and to preclude respondents from being subject to indefinite liabilities, it is clear that a precise statute of limitations is needed. In view of the tremendous backlog currently existing at the EEOC, and the failure to require a prompt serving of the charge on named respondents as discussed hereafter, equitable principles require a limitation on liability.

Our amendment, which failed by a tie vote, inserted language which provided that no order shall include backpay or liability which accrued more than two years prior to the filing of a charge with the Commission. In view of the equitable principles on which such amendment is based, it is deserving of bipartisan support.

2. Service of the Charge. At the hearings of this bill, it was brought out that in most cases, employers were not notified about the filing of a charge until months later, not uncommonly a year or more. As the Committee bill failed to remedy this problem, we sought to amend it to require service on the named respondent within 5 days after the filing of a charge. In the discussion that ensued it was emphasized that the 5 day figure was not a magic number and that any reasonable time period would be acceptable. Nevertheless, the Committee rejected the 5 day requirement and no reasonable alternative was offered.

It seems patent that failure to require timely notice violates all concepts of due process. Under the National Labor Relations Act, a charge is not deemed effectively filed for purposes of the 6 months statute of limitation *until* service of a copy of the charge on the respondent. In view of specific abuses regarding service of charges under title VII, a specific requirement for service on the respondent within a specified time period (5 to 7 days) is a prerequisite to maintaining minimum standards of due process.

3. Failure to Make Title VII an Exclusive Federal Remedy. Despite the enactment of title VII of the Civil Rights Act, charges of discriminatory employment conditions may still be brought under prior existing federal statutes such as the National Labor Relations Act and the Civil Rights Act of 1866. In view of the comprehensive prohibitions against discrimination contained in title VII, and the intent of the Committee bill to consolidate procedures and remedies under one agency, it would be consistent to make title VII the exclusive remedy. No public interest is served in continuing to permit a multiplicity of statutes or forums to deal with discrimination in employment. However, our attempt to amend the Committee bill to make title VII an exclusive remedy (except for pattern or practice suits) was rejected. In our view, the failure to make this an exclusive remedy merely encourages an individual who has lost his case in one forum under one statute to relitigate his case in still another forum under another federal statute. Under NLRB procedures and the proposed

EEOC procedures, the burden as well as the cost of prosecuting charges is borne by the respective agencies, and therefore, the taxpayer.

CONCLUSIONS

In essence, the Committee bill will result in interposing an additional obstacle in the nature of an administrative forum, between the aggrieved party and the effective judicial relief which can be achieved by a court enforced order. For the reasons previously documented, direct judicial relief can be obtained more quickly and thus more effectively through the federal district courts.

Secondly, and equally as important, the massive expansion of jurisdiction and the transferring of various programs to the EEOC at a time when the agency is struggling to control a burgeoning backlog of cases, will further hamstring efforts to bring meaningful and timely relief to persons aggrieved by discriminatory employment conditions. At a time when Congress should be directing its efforts solely to helping the EEOC become a more effective agency by giving it access to judicial enforcement, the committee bill represents a step backward and will thrust the EEOC into an administrative quagmire which can only delay the attainment of a reasonable standard of operational efficiency that Congress should expect and demand.

Lastly, the failure of the committee bill to include such minimal due process requirements as the prompt notification to named respondents, a reasonable statute of limitations as to backpay and other liability, and failure to make this an exclusive remedy, are critical omissions whose inclusion we deem vital to meet due process standards.

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JOHN DELLENBACK.
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INDIVIDUAL VIEWS OF REPRESENTATIVE MAZZOLI

I favor equal employment opportunity for all Americans and support all realistic legislative measures directed toward this goal. However, because of significant provisions contained in, and omitted from, the Committee version of H.R. 1746, I cannot support this legislation in the form in which it has been reported. It requires major amendment in order to become, in my opinion, realistic and appropriate legislation to end job discrimination.

My objections to H.R. 1746 conform generally to the objections raised in the Minority Views printed in this Report.

Basically, I prefer the stability, expedition and protection to plaintiff and defendant alike offered by judicial enforcement of equal employment rights over the administrative cease and desist approach contained in H.R. 1746.

I also prefer that a choice of remedies be incorporated into this legislation. A multiplicity of remedies and of forums, except in pattern and practice suits, is inconsistent with the intent of this legislation which is to consolidate and coordinate all efforts to eliminate discrimination in employment.

There ought also, in my opinion, to be a two-year statute of limitations incorporated into H.R. 1746. I concur with the Minority Views on this matter as set forth elsewhere in this Report.

Likewise, I concur in the conclusion and the reasoning of the minority in opposing the shift of the Office of Federal Contract Compliance to the Equal Employment Opportunities Commission.

On these groups and on others, most of which are discussed in the Minority Views printed in this Report, I cannot support the Committee version of H.R. 1746, and will support amendments or substitutes thereto.

ROMANO L. MAZZOLI.

92d CONGRESS
1st Session

H. R. 9247

IN THE HOUSE OF REPRESENTATIVES

JUNE 17, 1971

Mr. ERLENBORN (for himself and Mr. MAZZOLI) introduced the following bill; which was referred to the Committee on Education and Labor

A BILL

To further promote equal employment opportunities for American workers.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Equal Employment Opportunity Act of 1971".

SEC. 2. (a) Paragraph (6) of subsection (g) of section 705 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–4 (f) (6)) is amended to read as follows:

"(6) to refer matters to the Attorney General with recommendations for intervention in a civil action brought by an aggrieved party under section 706, or for the institution of a civil action by the Attorney General

under section 707, and to recommend institution of appellate proceedings in accordance with subsection (h) of this section, when in the opinion of the Commission such proceedings would be in the public interest, and to advise, consult, and assist the Attorney General in such matters.

(b) Subsection (h) of such section 705 is amended to read as follows:

"(h) Attorneys appointed under this section may, at the direction of the Commission, appear for and represent the Commission in any case in court, provided that the Attorney General shall conduct all litigation to which the Commission is a party in the Supreme Court or in the courts of appeals of the United States pursuant to this title. All other litigation affecting the Commission, or to which it is a party, shall be conducted by the Commission."

SEC. 3. (a) Subsection (a) of section 706 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–5) is amended to read as follows:

"(a) Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this title has occurred (and such charge sets forth the facts upon which it is based and the person or persons aggrieved) that an em-

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ployer, employment agency or labor organization has engaged in an unlawful employment practice, the Commission, within five days thereafter, shall furnish such employer, employment agency, or labor organization (hereinafter referred to as the 'respondent') with a copy of such charge and shall make an investigation of such charge, provided that such charge shall not be made public by the Commission. If the Commission shall determine after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such endeavors may be made public by the Commission without the written consent of the parties, or used as evidence in a subsequent proceeding. Any officer or employee of the Commission, who shall make public in any manner whatever any information in violation of this subsection shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned not more than one year.

(b) Subsection (d) of section 706 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) is amended to read as follows:

"(d) A charge under subsection (a) shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred, except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b), such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency. Except as provided in subsections (a) through (d) of this section and in section 707 of this Act, a charge filed hereunder shall be the exclusive remedy of any person claiming to be aggrieved by an unlawful employment practice of an employer, employment agency, or labor organization."

(c) Subsection (e) of section 706 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) is amended to read as follows:

"(e) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c), the Commission has been unable to obtain voluntary compliance with this Act, the Commission may bring a civil action against the re-

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spondent named in the charge: *Provided*, That if the Commission fails to obtain voluntary compliance and fails or refuses to institute a civil action against the respondent named in the charge within one hundred and eighty days from the date of the filing of the charge, a civil action may be brought after such failure or refusal within ninety days against the respondent named in the charge (1) by the person claiming to be aggrieved, or (2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (b) or further efforts of the Commission to obtain voluntary compliance."

(d) Subsections (f) through (k) of section 706 of the Civil Rights Act of 1964 (42 U.S.C. 200e-5) are redesignated as subsections (g) through (l), respectively,

and the following new selection is added after section 706 (e) thereof:

"(f) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge and the court having jurisdiction over such action shall have the authority to grant such temporary or preliminary relief as it deems just and proper: *Provided*, That no temporary restraining order or other preliminary or temporary relief shall be issued absent a showing that substantial and irreparable injury to the aggrieved party will be unavoidable. It shall be the duty of a court having jurisdiction over proceeding under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited."

(e) Subsection (h) of section 706 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–5) as redesignated by this section, is amended to read as follows:

"(h) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative

action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual, pursuant to section 706(a) and within the time required by section 706(d), neither filed a charge nor was named in a charge or amendment thereto, or was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a). No order made hereunder shall include back pay or other liability which has accrued more than two years before the filing of a complaint with said court under this title."

dential. Giving publicity to such action will be prohibited and punishable.

These amendments substantially improve the committee bill. We can all be grateful to the distinguished Chairman of the Subcommittee, the gentleman from Pennsylvania (Mr. Dent), for proposing them.

I urge all my colleagues to support the committee bill as modified by these amendments and to defeat the Erlenborn substitute.

Mr. ERLENBORN. Mr. Chairman, I yield 10 minutes to the gentleman from Minnesota (Mr. Quie).

(Mr. Quie asked and was given permission to revise and extend his remarks.)

Mr. QUIE. Mr. Chairman, as ranking minority member of the Committee on Education and Labor I was an active participant in helping to develop what I regard as the most effective approach to outlawing racial and other forms of arbitrary discrimination in the various aspects of the employment relationship. This approach is fully reflected in the substitute bill now before the House, H.R. 9247, introduced on a bipartisan basis by two members of our committee, Representatives Erlenborn and Mazzoli.

During the deliberations of the committee there was never any question that the EEOC—Equal Employment Opportunity Commission—created by the Civil Rights Act of 1964 sadly needed effective authority to enforce the law, an authority which it does not presently possess. Virtually all of our committee members were agreed on that—disagreement arose only as to which method of enforcement would be not only most effective but, expeditious, fair and equitable as well.

The committee bill resorts to what has become popularly known as the cease-and-desist approach. This means giving the Commission the power to hold hearings and to issue cease-and-desist orders enforceable in the Federal circuit courts of appeal. The National Labor Relations Board is a striking example of an agency utilizing that approach and all of us are aware how frequent a target of criticism, from management as well as labor, that agency has become.

The substitute bill, on the other hand, would in no wise change the existing structure of the EEOC. It would continue to have the authority to investigate charges of unlawful discrimination, to mediate and conciliate such controversies, and to seek their voluntary settlement. But added to these would be the power to bring suit directly in the Federal district courts against the parties whom the Commission, on the basis of its investigation, believed had engaged in unlawful discrimination.

The advantages of this judicial approach over the cease-and-desist procedure provided in the committee bill are immediately apparent. A decision in favor of the Commission by the district court would be immediately enforceable—a cease-and-desist order by the Commission would not; enforcement would require resort by the Commission to the appropriate Federal court of appeals. Thus the committee bill would require two procedural steps for enforcement—the substitute only the one.

Moreover, under the substitute, the district court could, if appropriate, grant relief at the commencement of the proceedings before it. In order to secure such immediate relief under the committee bill, the Commission would be compelled to seek it, not from the court of appeals which would ultimately enforce the Commission's cease-and-desist orders, but from a separate and distinct Federal district court

barriers often confront discrimination in the form of lower wages, or of segregation of women into the lowest paying jobs. The United Electrical Workers Union has estimated that American industry saves $22 billion a year by paying women lower wages than men for essentially the same work.

In 1969 the average American woman who worked full time earned only $60 for every $100 earned by the average American workingman and black women made 20 percent less than that.

Women who have completed college and at least 1 year of graduate school receive only 67 percent of the salary received by men with equivalent training—a woman with a college degree earned about as much as a man with an eighth-grade education averaged in 1968.

But women who are less educated and highly skilled suffer most—in 1966, women salesworkers received 41 percent of the salary received by men in the same occupation.

The nonwhite woman worker who labors under the double discrimination of race and sex faces the severest discrimination. In 1969 white women earned a median income of $5,182 compared with $8,668 for white and nonwhite men. Non-white women, however, who are most heavily concentrated in low-wage, low-skill jobs, earned $4,126 only 47 percent of the income of the average male worker, white or black.

The problems of Spanish-surnamed Americans, a racial minority, are no less serious. Although they are the second largest minority group in the United States, the Spanish-surnamed population is often neglected or ignored, even in view of the massive economic and social injustice to which they are subject, and cases involving discrimination against Orientals have been practically invisible under Title VII.

The unhappy history of continued employment discrimination against women and minorities, brings us to the question of how we can improve the act, to which we, as Americans, are committed. The Hawkins bill provides such improvement—the Erlenborn bill does not.

The double discrimination suffered by minority group women cannot be eliminated until we begin to deal boldly with their problems as women, as well as their problems as members of a minority.

The important elements in both bills are those dealing with enforcement powers for the EEOC and the scope of coverage of Title VII.

The Hawkins bill gives the EEOC cease-and-desist powers in addition to the right to issue affirmative orders for back pay and reinstatement. This power is crucial; an administrative order can be obtained within several months, while the median time for resolving a case in the U.S. district court is 19 months. Also, the cease-and-desist power is a power which is given to such regulatory agencies as the NLRB, the SEC, the FCC, and 34 State fair employment practices commissions.

In contrast, the Erlenborn bill would give the EEOC only the time-consuming remedy of court enforcement. It seems to be illogical and contrary to the intention of the Civil Rights Act of 1964 for the Attorney General or the district court to assume the function of deciding whether there has been discrimination when the EEOC has unique expertise, by virtue of its experience, in investigating and concluding cases concerned with employment discrimination.

Mr. REID of New York. Mr. Chairman, on the point of how rapidly cases proceed, let me just say that litigation on Title VII cases has been held up for years in courts.

For example, the case of Washington against T.G. & Y Stores has been before the Federal District Court for the Western District of Louisiana on motions to dismiss for 13 months, but the case has not yet reached trial. Even more outrageous is the fact that charges were originally brought in this case 3 years ago.

Second, let me point out that Chief Justice Burger has opposed legislative introduction of large numbers of cases into the Federal judicial system without first providing for the reorganization of that system.

In an address before the American Bar Association last year, Chief Justice Burger said:

> The difficulty lies in our tendency to meet new and legitimate demands with new laws which are passed without adequate consideration of the consequences in the terms of case load.

The Commission itself estimates that the new case load could be 20,000 additional cases.

I would submit that that would not result in expediting the administration of justice, but it could mean a lack of timely and effective enforcement.

The House passed this bill in 1966. The Senate passed it in 1970. I hope today that we make equal employment opportunity a reality now and defeat the Erlenborn amendment and then go on to approve the committee bill which is the kind of legislation that should have really been passed 20 years ago and which is legislation that is vitally necessary to our country.

The CHAIRMAN. The Chair recognizes the gentleman from Illinois (Mr. Erlenborn) for 4 minutes.

(Mr. Erlenborn asked and was given permission to revise and extend his remarks.)

Mr. ERLENBORN. Mr. Chairman. I am not going to take the time of the Committee now to again reiterate what is in my substitute or what is in the committee bill. I think we have had a thorough discussion of that during the last 2 days.

We also have had an issue raised, new this week, by the introduction of a new element by the gentleman from Pennsylvania (Mr. Dent) by some three amendments that he proposes to offer if he has an opportunity to offer them to the committee bill.

Two of those amendments are amendments that I offered in the subcommittee and in the full committee. They were rejected by the committee. I would still support them if it comes to that, but I hope it does not. I hope my substitute amendment is adopted.

The third point is another issue that has been somewhat debated and that is the question of removing from the OFCC jurisdiction the right to set effective goals, an affirmative action plan.

The circuit court of appeals has affirmed the Philadelphia plan.

There is an obligation requiring bidders on Federal or federally assisted construction projects to submit an affirmative action plan for the employment of minorities excluded from referral systems in six trades.

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The courts upheld this, and held specifically that it does not violate Title VII of the 1964 Civil Rights Act.

But what is the thrust of the gentleman's amendment? It can be one of two things. It either means nothing or it destroys the affirmative action authority that the OFCC now exercises.

I submit from the explanation of the gentleman from Pennsylvania (Mr. Dent) that he believes it does the latter—it destroys this authority.

How the proponents of civil rights can support this sort of amendment and can take the floor and say that this is a fine thing—I do not understand, because the one great opportunity for greater minority employment in the construction crafts has been through the OFCC affirmative action plan.

Yesterday I referred to an editorial published in the Wall Street Journal and read a part of it. A good deal of the debate we have had concerning the effectiveness of enforcement proceedings, cease and desist vis-a-vis court enforcement, has been as to the speed and effectiveness of the opposing enforcement procedures. This editorial in the Wall Street Journal addresses itself to that point:

But speed is only one measure of effectiveness; final results are a better gauge. But by that measure, too, the scholarly critics doubt that complex problems of bias, deeply rooted in many aspects of the society, lend themselves to resolution through cease and desist orders. For one thing such orders issued by the labor board have the relatively limited function of getting parties to negotiate. At the EEOC, they would presumably have to carry a greater problem-solving load. Furthermore, some experts worry that a substantially strengthened EEOC would invite subversion from special-interest groups.

Concluding, the editorial states—

No doubt, the new powers Congress confers upon the EEOC will profoundly affect the future course of the civil-rights movement. While most civil-rights advocates prefer cease and desist, it's by no means clear that this approach would ultimately prove more effective than merely authorizing the EEOC to ask courts to enforce its anti-discrimination rulings. As Mr. Blumrosen writes: "One court decision is worth 10 written conciliation agreements and one hundred annual reports of administrative agencies."

Mr. Chairman, I urge support of the Erlenborn-Mazzoli substitute, which would give the Commission the right to go into court, resulting in fairness to both parties, and expeditious, judicial and fair relief. I hope the Erlenborn-Mazzoli substitute is adopted.

The CHAIRMAN. The Chair recognizes the gentleman from California (Mr. Hawkins).

(Mr. Hawkins asked and was given permission to revise and extend his remarks.)

Mr. HAWKINS. Mr. Chairman, I was quite upset when the minority leader some time earlier mentioned the Philadelphia plan as the main support apparently of blacks and others to get jobs in America.

In the first year of the operation of this plan do you know how many blacks got jobs? Less than 100. Do you know how many women have gotten jobs in the history of the Philadelphia plan? Not a single one. Yet the gentleman has the nerve to put that forth as a civil rights record to go to the American people.

The gentleman from Illinois (Mr. Erlenborn) says that we are attempting to destroy affirmative action plans by transferring the authority of the Office of Federal Contract Compliance. The amendment

I urge my colleagues to cast their votes for true liberty and justice for all, by voting for the original bill and against the substitute.

Mr. ROBISON of New York. Mr. Chairman, I am supporting—and intend to vote for—the committee bill, H.R. 1746. I recognize that there are favorable things which can be said about both the committee bill and the proposed substitute, H.R. 9247; and I recognize, too, that several outstanding business leaders in the Nation and in my congressional district have expressed the opinion that the committee bill places an unfair burden on segments of the business community. But, on balance, I feel the committee bill gives us the best chance to further equal employment opportunities for all American workers, and does so in a manner consistent with the themes of justice and fairness which are so rightfully important to my friends in the business community.

There is little debate today about the necessity for some action. Everyone appears to agree that more can—and should—be done at the Federal level to insure all citizens equal access to available job markets. Proponents of the committee bill and the substitute bill both agree that the Equal Employment Opportunity Commission needs a form of enforcement power. The only question is what kind of enforcement power is the fairest and most effective to all involved.

The substitute bill would permit EEOC attorneys to sue in Federal district courts in cases where the EEOC has found reasonable cause to believe a violation has occurred. In the abstract, this seems reasonable enough. But litigation in the Federal courts can be a lengthy, and expensive process—to everyone concerned. The average length of time for a Federal court action, for example, is 19 months. By flooding the district courts with all Federal job discrimination cases, this backlog can only increase. Meanwhile, those allegedly discriminated against are still frozen from a possible job opportunity. In this type of case, I doubt the effectiveness of such enforcement; and I think business leaders should also realize that defending actions in this way is going to be an expensive proposition indeed.

The committee bill, on the other hand, proposes to give EEOC authorization to issue complaints, hold hearings, and where an unlawful employment practice is found, issue appropriate orders, subject of course, to judicial review. This "cease-and-desist" method of enforcement is the same type of mechanism given to virtually every other Federal regulatory agency and is the same adopted by 32 of the 37 States which have agencies to enforce equal employment opportunity laws—including New York.

Of course, if a full hearing is demanded, a final decision might still take several months to be reached—although not nearly as long as the average Federal court action—but since the agency would have "cease-and-desist" authority, it should be able to settle complaints much more expeditiously without going to hearing. This has been the experience of the NLRB, for example, where 95 percent of its cases do not go to hearing. This is as much a protective device for the businessman as it is for the complainant since it cuts off the threat of scurrilous complaints dragging them into extensive and expensive litigation.

There appears to be little grievance about the operation of the State agencies already in existence which have powers roughly equivalent to those proposed in the committee bill. At least, I have never had a

much about actions affecting them, over which they have no control—and over which their elected representatives have little if any control.

There is an old truism which goes like this:

> Vice is a monster of such frightful mien,
> As to be hated needs but to be seen;
> But seen too oft—familiar with its face,
> We first despise, then pity, then embrace.

I am afraid that is what is happening here. Step by step, power and control over individuals is expanded. The matter of discrimination in employment, when it occurs, should be handled by a process of conciliation. The average businessman is reasonable and sensible. In a highly competitive field, in his employment practices, he is obliged to choose people who can get along, attract business for him, and produce better than some other applicant for the job. That system puts a premium on merit and productivity. He should not be put in a straight jacket in exercising his judgment in deciding on an employee's worth to fill his particular needs. Every businessman in America is complaining about too much Government control over decisions which he is much better able to make.

I have already said I am supporting the pending substitute offered by the gentleman from Illinois (Mr. Erlenborn). It would water down and make much less offensive the provisions of H.R. 1746. I do hope it will be approved.

The CHAIRMAN. All time has expired.

The question is on the amendment in the nature of a substitute offered by the gentleman from Illinois (Mr. Erlenborn).

TELLER VOTE WITH CLERKS

Mr. ERLENBORN. Mr. Chairman, I demand tellers.

Tellers were ordered.

Mr. ERLENBORN. Mr. Chairman, I demand tellers with clerks.

Tellers with clerks were ordered.

PARLIAMENTARY INQUIRY

Mr. DENT. Mr. Chairman, a parliamentary inquiry.

The CHAIRMAN. The gentleman will state it.

Mr. DENT. Mr. Chairman, a vote in the affirmative will be a vote for the Erlenborn amendment in the nature of a substitute; and a vote against it, a no vote, will be a vote that will preserve the opportunity for further amendments. Is that correct?

The CHAIRMAN. The Chair will state the proposition. The question occurs on the Erlenborn amendment, the amendment in the nature of a substitute. A vote of "aye" will be a vote in favor of the substitute. A vote of "no" will be a vote against the substitute as offered by the gentleman from Illinois (Mr. Erlenborn).

The CHAIRMAN appointed as tellers Messrs. Erlenborn, Dent, Hawkins, and Steiger of Wisconsin.

The Committee divided.

The CHAIRMAN. Twelve minutes have expired. Are there any Members in the Chambers who have not voted and wish to vote?

Mr. FULTON of Pennsylvania. Mr. Chairman, a parliamentary inquiry.

The CHAIRMAN. The gentleman will state his parliamentary inquiry.

Mr. FULTON of Pennsylvania. Mr. Chairman, does not the rule explicitly state that the 12 minutes is the minimum? So, there is no 12-minute expiration. Any Member may vote so long as he is in the Chamber before the final report is made; is that not correct?

The CHAIRMAN. The Chair has so ruled.

Is there any Member in the Chamber who has not voted but who wishes to vote?

Mr. FULTON of Pennsylvania. Mr. Chairman, a further parliamentary inquiry.

The CHAIRMAN. The gentleman will state his parliamentary inquiry.

Mr. FULTON of Pennsylvania. It is definite, then, that there is no maximum time limitation on a recorded teller vote?

The CHAIRMAN. Not until the vote is so announced.

The Committee divided, and the tellers reported that there were—ayes 200, noes 194, not voting 40, as follows:

[Roll No. 261]

[Recorded Teller Vote]

AYES—200

Abernethy	Clausen, Don H.	Goodling
Andrews, Ala.	Cleveland	Griffin
Andrews, N. Dak.	Collier	Gross
Archer	Collins, Tex.	Grover
Arends	Colmer	Hagan
Ashbrook	Conable	Haley
Baker	Crane	Hall
Baring	Daniel, Va.	Hammerschmidt
Belcher	Davis, Ga.	Hansen, Idaho
Bell	Davis, Wis.	Harsha
Bennett	Delaney	Harvey
Betts	Dellenback	Hébert
Bevill	Dennis	Henderson
Blackburn	Devine	Hillis
Bow	Dickinson	Hosmer
Bray	Dorn	Hull
Brinkley	Dowdy	Hunt
Broomfield	Downing	Hutchinson
Brotzman	Duncan	Ichord
Brown, Mich.	du Pont	Jonas
Broyhill, N.C.	Edwards, Ala.	Jones, Ala.
Broyhill, Va.	Erlenborn	Jones, N.C.
Buchanan	Esch	Jones, Tenn.
Burke, Fla.	Evins, Tenn.	Keating
Burleson, Tex.	Findley	Keith
Byrnes, Wis.	Fisher	Kemp
Byron	Flowers	King
Cabell	Flynt	Kuykendall
Caffery	Ford, Gerald R.	Kyl
Camp	Forsythe	Landgrebe
Carter	Fountain	Landrum
Casey, Tex.	Frelinghuysen	Latta
Cederberg	Fuqua	Lennon
Chamberlain	Galifianakis	Lent
Chappell	Gettys	Lloyd
Clancy	Gibbons	Lujan

McClure
McCollister
McKevitt
McMillan
Mahon
Mailliard
Mann
Martin
Mathias, Calif.
Mathis, Ga.
Mayne
Mazzoli
Michel
Miller, Ohio
Mills, Md.
Minshall
Mizell
Myers
Natcher
Nelsen
Nichols
Passman
Patman
Pelly
Pettis
Pickle
Pirnie
Poage
Poff
Powell
Preyer, N.C.
Price, Tex.
Purcell
Quie
Quillen
Rarick
Reid, Ill.
Rhodes
Roberts
Robinson, Va.
Rogers
Rousselot
Runnels
Ruppe
Ruth
Sandman
Satterfield
Scherle
Schmitz
Schneebeli
Schwengel
Scott
Shriver
Sikes
Skubitz
Smith, Calif.
Smith, N.Y.
Snyder
Spence
Springer
Steiger, Ariz.
Steiger, Wis.
Stephens
Stubblefield
Stuckey
Talcott
Taylor
Teague, Calif.
Terry
Thompson, Ga.
Thomson, Wis.
Thone
Veysey
Waggonner
Wampler
Ware
Watts
Whalley
White
Whitehurst
Whitten
Wiggins
Williams
Wilson, Bob
Winn
Wright
Wyatt
Wylie
Wyman
Young, Fla.
Young, Tex.
Zion

NOES—194

Abourezk
Abzug
Adams
Addabbo
Albert
Anderson, Calif.
Anderson, Ill.
Annunzio
Ashley
Aspin
Aspinall
Badillo
Barrett
Begich
Bergland
Biaggi
Biester
Bingham
Blanton
Blatnik
Boggs
Boland
Bolling
Brademas
Brasco
Brooks
Burke, Mass.
Burlison, Mo.
Burton
Byrne, Pa.
Carey, N.Y.
Carney
Celler
Chisholm
Clay
Collins, Ill.
Conte
Conyers
Corman
Cotter
Coughlin
Culver
Daniels, N.J.
Danielson
Davis, S.C.
de la Garza
Dellums
Denholm
Dent
Diggs
Dingell
Donohue
Dow
Drinan
Duiski
Eckhardt
Edmondson
Edwards, Calif.
Eilberg
Fish
Flood
Foley
Ford, William D.
Fraser
Frenzel
Fulton, Pa.
Fulton, Tenn.
Gallagher
Garmatz
Gaydos
Giaimo
Grasso
Gray
Green, Oreg.
Green, Pa.
Griffiths
Gude
Halpern
Hamilton
Hanley
Hanna
Harrington
Hathaway
Hawkins
Hays
Hechler, W. Va.
Heckler, Mass.
Helstoski
Hicks, Mass.
Hicks, Wash.
Hogan
Holifield
Horton
Howard
Hungate
Jacobs

Johnson, Calif.	Mosher	Ryan
Kastenmeier	Moss	St Germain
Kazen	Murphy, N.Y.	Sarbanes
Kee	Nedzi	Saylor
Klucsynski	Nix	Scheuer
Koch	Obey	Shipley
Kyros	O'Hara	Sisk
Leggett	O'Konski	Slack
Link	O'Neill	Smith, Iowa
Long, Md.	Patten	Stanton, J. William
McClory	Pepper	Stanton, James V.
McCloskey	Perkins	Steed
McCormack	Peyser	Steele
McDade	Pike	Stratton
McDonald, Mich.	Podell	Symington
McFall	Price, Ill.	Teague, Tex.
McKay	Pucinski	Thompson, N.J.
Macdonald, Mass.	Randall	Tiernan
Madden	Rangel	Udall
Matsunaga	Rees	Ullman
Meeds	Reid, N.Y.	Van Deerlin
Melcher	Reuss	Vanik
Metcalfe	Riegle	Vigorito
Mikva	Robison, N.Y.	Waldie
Miller, Calif.	Rodino	Whalen
Mills, Ark.	Roe	Wilson, Charles H.
Minish	Roncalio	Wolff
Mink	Rooney, N.Y.	Wydler
Mitchell	Rooney, Pa.	Yates
Monagan	Rosenthal	Yatron
Moorhead	Rostenkowski	Zablocki
Morgan	Roush	Zwach
Morse	Roy	

NOT VOTING—40

Abbitt	Gonzalez	Pryor, Ark.
Alexander	Gubser	Railsback
Anderson, Tenn.	Hansen, Wash.	Roybal
Brown, Ohio	Hastings	Sebelius
Clark	Jarman	Selberling
Clawson, Del	Johnson, Pa.	Shoup
Derwinski	Karth	Stafford
Dwyer	Long, La.	Staggers
Edwards, La.	McCulloch	Stokes
Eshleman	McEwen	Sullivan
Evans, Colo.	McKinney	Vander Jagt
Fascell	Mollohan	Widnall
Frey	Montgomery	
Goldwater	Murphy, Ill.	

So the amendment in the nature of a substitute was agreed to.

The CHAIRMAN. Under the rule, the Committee rises.

Accordingly the Committee rose; and the Speaker having resumed the chair, Mr. Adams, Chairman of the Committee of the Whole House on the State of the Union, reported that that Committee, having had under consideration the bill (H.R. 1746) to further promote equal employment opportunities for American workers, pursuant to House Resolution 542, he reported the bill back to the House with an amendment adopted by the Committee of the Whole.

The SPEAKER. Under the rule, the previous question is ordered.

The question is on the amendment.

ANDERSON of California, DOW, ROY, ST GERMAIN, DONOHUE, KUYKENDALL, CONTE, and GUDE changed their votes from "yea" to "nay."

Messrs. MORGAN, STAGGERS, CHAPPELL, and GROSS changed their votes from "nay" to "yea."

The result of the vote was announced as above recorded.

The SPEAKER. The question is on the passage of the bill.

Mr. PERKINS. Mr. Speaker, on that I demand the yeas and nays.

The yeas and nays were ordered.

The question was taken; and there were—yeas 285, nays 106, not voting 42 as follows:

[Roll No. 264]

YEAS—285

Abzug	Chamberlain	Gaydos
Adams	Clancy	Gibbons
Addabbo	Clausen, Don H.	Gonzalez
Anderson, Calif.	Collier	Goodling
Anderson, Ill.	Collins, Ill.	Gray
Andrews, N. Dak.	Conable	Green, Pa.
Annunzio	Conte	Grover
Arends	Corman	Gude
Ashley	Cotter	Halpern
Aspin	Coughlin	Hamilton
Badillo	Culver	Hanley
Barrett	Daniels, N.J.	Hanna
Belcher	Danielson	Hansen, Idaho
Bell	Davis, Wis.	Harrington
Bennett	de la Garza	Harsha
Bergland	Delaney	Harvey
Betts	Dellenback	Hawkins
Biaggi	Dennis	Hayes
Biester	Dingell	Hechler, W. Va.
Bingham	Donohue	Helstoski
Blanton	Dow	Hicks, Mass.
Blatnik	Downing	Hicks, Wash.
Boggs	Dulski	Hillis
Boland	Duncan	Hogan
Bolling	du Pont	Holifield
Bow	Eckhardt	Horton
Brademas	Edwards, Ala.	Hosmer
Brasco	Edwards, Calif.	Howard
Bray	Eilberg	Hunt
Brooks	Erlenborn	Hutchinsn
Broomfield	Esch	Ichord
Brotzman	Evins, Tenn.	Jacobs
Brown, Mich.	Fascell	Johnson, Calif.
Brown, Ohio	Findley	Jonas
Broyhill, N.C.	Fish	Jones, N.C.
Buchanan	Flood	Kastenmeier
Burke, Fla.	Foley	Keating
Burke, Mass.	Ford, Gerald R.	Keith
Burlison, Mo.	Forsythe	King
Burton	Fountain	Kluczynski
Byrne, Pa.	Fraser	Koch
Byrnes, Wis.	Frelinghuysen	Kyl
Byron	Frenzel	Kyros
Carey, N.Y.	Fulton, Pa.	Latta
Carney	Fulton, Tenn.	Leggett
Carter	Fuqua	Lent
Casey, Tex.	Galifianakis	Link
Cederberg	Gallagher	Lloyd
Celler	Garmatz	Long, Md.

Lujan	Perkins	Smith, Iowa
McClory	Pettis	Smith, N.Y.
McCloskey	Peyser	Springer
McClure	Pickle	Stanton, J. William
McCollister	Pike	Stanton, James V.
McDade	Pirnie	Steele
McDonald, Mich.	Podell	Steiger, Ariz.
McFall	Poff	Steiger, Wis.
McKay	Preyer, N.C.	Stokes
McKevitt	Price, Ill.	Stratton
Macdonald, Mass.	Price, Tex.	Talcott
Madden	Pucinski	Taylor
Mailliard	Quie	Teague, Calif.
Mann	Quillen	Terry
Martin	Rangel	Thompson, N.J.
Mathias, Calif.	Rees	Thomson, Wis.
Matsunaga	Reid, Ill.	Thone
Mayne	Reid, N.Y.	Tiernan
Mazzoli	Reuss	Ullman
Meeds	Rhodes	Van Deerlin
Melcher	Riegle	Vander Jagt
Metcalfe	Robison, N.Y.	Vanik
Michel	Rodino	Veysey
Mikva	Roe	Vigorito
Miller, Calif.	Rogers	Waldie
Miller, Ohio	Roncalio	Wampler
Minish	Rooney, N.Y.	Ware
Minshal	Rooney, Pa.	Whalen
Mitchell	Rosenthal	Whalley
Monagan	Rostenkowski	White
Moorhead	Roush	Whitehurst
Morgan	Roy	Wiggins
Morse	Ruppe	Williams
Mosher	Ryan	Wilson, Charles H.
Moss	St Germain	Winn
Murphy, N.Y.	Sandman	Wolff
Myers	Sarbanes	Wright
Natcher	Saylor	Wyatt
Nelsen	Scheuer	Wydler
Nix	Schneebeli	Wylie
Obey	Schwengel	Wyman
O'Konski	Seiberling	Yates
O'Neill	Shriver	Yatron
Patten	Sisk	Zablocki
Pelly	Skubitz	Zion
Pepper	Smith, Calif.	Zwach

NAYS—106

Abernethy	Clay	Fisher
Abourezk	Collins, Tex.	Flowers
Andrews, Ala.	Colmer	Flynt
Archer	Conyers	Ford, William D.
Aspinall	Crane	Gettys
Baker	Daniel, Va.	Giaimo
Baring	Davis, Ga.	Grasso
Begich	Davis, S.C.	Green, Oreg.
Bevill	Dellums	Griffin
Blackburn	Denholm	Griffiths
Brinkley	Dent	Gross
Broyhill, Va.	Devine	Hagan
Burleson,, Tex.	Dickinson	Haley
Cabell	Diggs	Hall
Caffery	Dorn	Hammerschmidt
Camp	Dowdy	Hébert
Chappell	Drinan	Heckler, Mass.
Chisholm	Edmondson	Henderson

Hull	O'Hara	Sikes
Hungate	Passman	Slack
Jones, Ala.	Patman	Snyder
Jones, Tenn.	Poage	Spence
Kazen	Powell	Staggers
Kee	Purcell	Steed
Kuykendall	Randall	Stephens
Landgrebe	Rarick	Stubblefield
Landrum	Roberts	Stuckey
Lennon	Robinson, Va.	Teague, Tex.
McMillan	Rousselot	Thompson, Ga.
Mahon	Runnels	Waggonner
Mathis, Ga.	Ruth	Watts
Mills, Ark.	Satterfield	Whitten
Mills, Md.	Scherle	Young, Fla.
Mink	Schmitz	Young, Tex.
Nedzi	Scott	
Nichols	Shipley	

NOT VOTING—42

Abbitt	Gubser	Mollohan
Alexander	Hansen, Wash.	Montgomery
Anderson, Tenn.	Hastings	Murphy, Ill.
Ashbrook	Hathaway	Pryor, Ark.
Clark	Jarman	Railsback
Clawson, Del	Johnson, Pa.	Roybal
Cleveland	Karth	Sebelius
Derwinski	Kemp	Shoup
Dwyer	Long, La.	Stafford
Edwards, La.	McCormack	Sullivan
Eshleman	McCulloch	Symington
Evans, Colo.	McEwen	Udall
Frey	McKinney	Widnall
Goldwater	Mizell	Wilson, Bob

So the bill was passed.

The Clerk announced the following pairs:

On this vote:

Mr. Evans of Colorado for, with Mr. Montgomery against.
Mr. Del Clawson for, with Mr. Ashbrook against.

Until further notice:

Mr. Clark with Mr. Widnall.
Mr. Hathaway with Mr. Cleveland.
Mrs. Hansen of Washington with Mr. Goldwater.
Mr. Alexander with Mr. Derwinski.
Mrs. Sullivan with Mrs. Dwyer.
Mr. Udall with Mr. Kemp.
Mr. Karth with Mr. Gubser.
Mr. Mollohan with Mr. McKinney.
Mr. Pryor of Arkansas with Mr. Shoup.
Mr. Roybal with Mr. Bob Wilson.
Mr. Murphy of Illinois with Mr. Railsback.
Mr. Symington with Mr. Johnson of Pennsylvania.
Mr. Anderson of Tennessee with Mr. McCulloch.
Mr. McCormack with Mr. Stafford.
Mr. Abbitt with Mr. Sebelius.
Mr. Jarman with Mr. Eshleman.
Mr. Edwards of Louisiana with Mr. Mizell.
Mr. Long of Louisiana with Mr. Frey.
Mr. Hastings with Mr. McEwen.

The result of the vote was announced as above recorded.

A motion to reconsider was laid on the table.

Calendar No. 412

92D CONGRESS
1ST SESSION

S. 2515

[Report No. 92–415]

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 14, 1971

Mr. BYRD of West Virginia (for Mr. WILLIAMS) (for himself, Mr. BAYH, Mr. BROOKE, Mr. CASE, Mr. CHURCH, Mr. CRANSTON, Mr. EAGLETON, Mr. GRAVEL, Mr. HARRIS, Mr. HART, Mr. HARTKE, Mr. HUGHES, Mr. HUMPHREY, Mr. INOUYE, Mr. JACKSON, Mr. JAVITS, Mr. KENNEDY, Mr. MCGOVERN, Mr. MAGNUSON, Mr. METCALF, Mr. MONDALE, Mr. MONTOYA, Mr. MOSS, Mr. MUSKIE, Mr. NELSON, Mr. PELL, Mr. PERCY, Mr. PROXMIRE, Mr. RIBICOFF, Mr. SCOTT, Mr. SCHWEIKER, Mr. STEVENSON, and Mr. TUNNEY) introduced the following bill; which was read twice and referred to the Committee on Labor and Public Welfare

OCTOBER 28, 1971

Reported by Mr. WILLIAMS, with an amendment

[Strike out all after the enacting clause and insert the part printed in italic]

A BILL

To further promote equal employment opportunities for American workers.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

~~That this Act may be cited as the "Equal Employment Opportunities Enforcement Act of 1971".~~

as applicable, shall govern civil actions brought hereunder. Related proceedings may be consolidated for hearing. Any officer or employee of the Commission who filed a charge in any case shall not participate in a hearing on any complaint arising out of such charge, except as a witness.

"(g) A respondent shall have the right to file an answer to the complaint against him and with the leave of the Commission, which shall be granted whenever it is reasonable and fair to do so, may amend his answer at any time. Respondents and the person or persons aggrieved shall be parties and may appear at any stage of the proceedings, with or without counsel. The Commission may grant other persons a right to intervene or to file briefs or make oral arguments as amicus curiae or for other purposes, as it considers appropriate. All testimony shall be taken under oath and shall be reduced to writing. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the Rules of Civil Procedure for the district courts of the United States.

"(h) If the Commission finds that the respondent has engaged in an unlawful employment practice, the Commission shall state its findings of fact and shall issue and cause to be served on the respondent and the person or persons aggrieved by such unlawful employment practice an order requiring the respondent to cease and desist from such un-

lawful employment practice and to take such affirmative action, including reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organizations, as the case may be, responsible for the unlawful employment practice), as will effectuate the policies of this title, except that (1) back pay liability shall not exceed that which has accrued more than two years prior to the filing of a charge with the Commission, and (2) interim earnings or amounts earnable with reasonable diligence by the aggrieved person or persons shall operate to reduce the back pay otherwise allowable. Such order may further require such respondent to make reports from time to time showing the extent to which he has complied with the order. If the Commission finds that the respondent has not engaged in any unlawful employment practice, the Commission shall state its findings of fact and shall issue and cause to be served on the respondent and the person or persons alleged in the complaint ot be aggrieved an order dismissing the complaint.

"(i) After a charge has been filed and until the record has been filed in court as hereinafter provided, the proceeding may at any time be ended by agreement between the Commission and the respondent for the elimination of the alleged unlawful employment practice and the Commission may at any time, upon reasonable notice, modify or set aside, in

may be, in the United States district court for any judicial district in the State in which the unlawful employment practice concerned is alleged to have been committed, or the judicial district in which the aggrieved person would have been employed but for the alleged unlawful employment practice, but, if the respondent is not found within any such judicial district, such an action may be brought in the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28, United States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a judicial district in which such an action might have been brought. Upon the bringing of any such action, the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law. Rule 65 of the Federal Rules of Civil Procedure, except paragraph (a)(2) thereof, shall govern proceedings under this subsection.

"(q)(1) If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not issued a complaint under subsection (f), the Attorney General has not filed a civil action under subsection

(f), or the Commission has not entered into an agreement under subsection (f) or (i) to which the person aggrieved is a party, the Commission shall so notify the person aggrieved and within sixty days after the giving of such notice a civil action may be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, or (2) if such charge was filed by an officer or employee of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon the commencement of such civil action, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall take no further action with respect thereto, except that, upon timely application, the court in its discretion may permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action if the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, certifies that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than

Calendar No. 412

92D CONGRESS
1st Session

SENATE

REPORT
No. 92-415

EQUAL EMPLOYMENT OPPORTUNITIES ENFORCEMENT ACT OF 1971

OCTOBER 28, 1971.—Ordered to be printed

Mr. WILLIAMS, from the Committee on Labor and Public Welfare, submitted the following

REPORT

together with

INDIVIDUAL AND SUPPLEMENTAL VIEWS

[To accompany S. 2515]

The Committee on Labor and Public Welfare, to which was referred the bill (S. 2515) to further promote equal employment opportunities for American workers, having considered the same, reports favorably thereon with an amendment (in the nature of a substitute) and recommends that the bill as amended do pass.

SUMMARY

The principal purpose of S. 2515 is to amend title VII of the Civil Rights Act of 1964 to provide the Equal Employment Opportunity Commission with a method for enforcing the rights of those workers who have been subjected to unlawful employment practices.

The enforcement procedures provided for in S. 2515 include the issuance of a complaint by the Commission after an investigation and efforts to conciliate, followed by a full administrative hearing on the record, the issuance of a cease and desist order by the Commission, and an opportunity for review by an appropriate court of appeals.

The bill confers upon the Commission the authority to proceed with pattern and practice cases of discrimination, and phases out the Attorney General's existing authority in such cases over a 2-year period. The Secretary of Labor's enforcement functions under Executive Order 11246 as amended relating to nondiscrimination in employment by Government contractors and Federally assisted construction contractors are transferred to the Commission.

The committee is concerned, however, about the interplay between the newly created enforcement powers of the Commission and the existing right of private action. It concluded that duplication of proceedings should be avoided. The bill therefore contains a provision for cutoff of the Commission's jurisdiction once the private action has been filed—except for the power to intervene—as well as a cutoff of the right of private action once the Commission issues a complaint or enters into a conciliation or settlement agreement which is satisfactory to the Commission and the aggrieved party.

If the Commission is able to reach a conciliation or settlement agreement with the respondent, but such agreement is not acceptable to the person aggrieved, the Commission need not proceed with the issuance of a complaint. In such event, the private right of action would be preserved.

The committee also concluded that the aggrieved person's right to institute a private action should be reactivated under certain circumstances if the Commission does not act promptly after issuing a complaint. The bill contains a provision, in section 706(q), that permits the aggrieved person to bring a civil action against the respondent if the Commission has not issued its order within 180 days after issuing the complaint. However, during the period from 180 days to 1 year after issuance of the Commission's complaint, the aggrieved person who files a private action must notify the Commission of such filing, and the Commission may petition the court to stay or dismiss the private action if the Commission shows that it has been acting with due diligence, that it anticipates the issuance of its order within a reasonable period of time, that the proceeding is an exceptional one, and that extension of the Commission's jurisdiction is warranted.

The committee believes that aggrieved persons are entitled to have their cases processed promptly and that the Commission should develop its capacity to proceed rapidly with the hearing and decision on charges once the complaint has issued. Six months is a sufficient period of time for the normal case to be processed from complaint to order, and the Commission should be required to explain to the satisfaction of the court why it needs additional time. Accordingly, when a private action is filed after the 180 day period has elapsed from the issuance of the Commission's complaint, the court ordered delay that is provided for by this section should be the exception rather than the rule, and would not be justified simply because backlogs and inadequate resources have slowed the Commission's work. The primary concern should be to protect the aggrieved person's option to seek a prompt remedy.

It should be noted, however, that it is not the intention of the committee to permit an aggrieved party to retry his case merely because he is dissatisfied with the Commission's action. Once the Commission has issued an order, further proceedings must be in the courts of appeals pursuant to subsections 706(k)–(n).

The committee would also note that neither the above provisions regarding the individual's right to sue under title VII, nor any of the other provisions of this bill, are meant to affect existing rights granted under other laws.

INDIVIDUAL VIEWS OF MR. DOMINICK

Since enactment as part of the Civil Rights Act of 1964, Title VII has stood as a national commitment to the elimination of all forms of employment discrimination. Unfortunately, such a commitment has remained only a statement which, because of the lack of enforcement machinery, has not been translated into concrete realities for those in the nation's workforce who have been denied employment benefits because of their race, color, religion, sex or national origin. The issue is no longer whether we need enforcement powers for Title VII, but rather what form and scope of enforcement is needed to best protect the rights of all parties involved. To accomplish this end the Senate is given two types of enforcement machinery to choose from—vesting EEOC with cease and desist powers or giving EEOC the authority to sue directly in Federal Courts.

Elemental Arguments Misleading

It is overly simplistic to argue as many have, that protection of employees rights can best be achieved by vesting the present pro-employee Commission with as much enforcement power as possible. The vicissitudes of Presidentially appointed Boards is legend. The administrative Board possessing enforcement powers most similar to the cease and desist powers advocated by the majority, the National Labor Relations Board, provides the best example of this. Critics charge that the NLRB, in reacting to political winds rather than stare decisis, have fluctuated from pro-management decisions during the Eisenhower Administration to pro-labor positions during the Johnson and Kennedy Administration. Determination of employment civil rights deserves and requires non-partisan judgment. This judgment is best afforded by Federal court judges who, shielded from political influence by life tenure, are more likely to withstand political pressures and render their decisions in a climate tempered by judicial reflection and supported by historical judicial independence.

Likewise simplistic reasoning has classified proponents of court enforcement as being pro-respondent or anti-employees' rights. Nothing could be less correct. Both procedures seek to achieve the same end—the fair redress of employees' grievances. Although I opposed the cease and desist provisions, I voted to report S. 2515, as amended, out of committee favorably as I was most encouraged by the potential relief its compromise amendments offered federal employees. As the report indicates, these employees are the most frustrated in achieving equal employment opportunity. I authored an amendment with Senator Cranston which was adopted that provided the approximately 2.6 million civil service and postal workers with court redress of their employment discrimination grievances. The amendment creates machinery suggested by Clarence Mitchell, Director, Washington Bureau,

law has developed in a liberal fashion appropriate to a humanitarian and remedial statute. The implementation of Title VII gives hope for the future of all Americans.

Court Enforcement Provides an Expeditious and Final Remedy

Effective protection of the rights of both the employer and the employee demands a speedy resolution of the dispute. Facts indicate that the court enforcement procedure is more expeditious as it involves a one step enforcement procedure whereas the cease and desist order requires two steps. A district court order is immediately self-enforcing as it is backed by court contempt proceedings. A commission cease and desist order must be brought to the Court of Appeals before it achieves similar sanction power. Additionally, there is a definite advantage in having the judge who enters the original order be the person who will hear any subsequent enforcement proceedings. A judge who is enforcing his own orders rather than those of some commission will be determined that such orders are properly enforced.

To a large extent, speedy resolution of an unfair employment practice will be determined by the respective caseloads of the EEOC and the district courts. Chairman Brown of the EEOC testified that as of June 30, 1971, the Commission had a backlog of 32,000 cases with an anticipated fiscal year 1971 caseload of 32,000 additional cases. Also S. 2515 would expand coverage from the present employers with 25 or more employees to those with 8 or more employees, thereby adding approximately 6.5 million potential aggrieved. Additionally, the EEOC will be responsible for conciliating disputes of an additional 10.1 million State and local government employees pursuant to the adopted Eagleton-Taft amendment. While the present EEOC complaint disposition requires from 18 to 24 months, the median time interval from issue to trial for non jury trials in U.S. district courts in 1970 was ten months according to the Annual Report of the Director of the Administrative Office of the U.S. Courts. Congressman Erlenborn testified before the Labor Subcommittee that of the 29 District Courts which would receive the brunt of the unfair employment practice cases from the top ten states in terms of EEOC recommended investigation, 21 courts had a medium time of 12 months or less for non jury trials and 8 courts had a medium time of 6 months or less for a non jury trial.

In addition, a further impediment to timely action under the administrative approach is that only the Commission in Washington and not any of the field attorneys could issue cease and desist orders. The judicial approach offers potential remedies through 398 judges on the bench in 93 existing federal district courts.

Hopefully, the above discussion will serve to better clarify an issue which in the recent past has been the subject of much rhetoric and little objectivity.

Transfer of "Pattern and Practice" Unjustified

In addition to the previously discussed major issue, I am concerned by the provision of S. 2515 which transfers "pattern and practice" suits from the jurisdiction of the Justice Department to the EEOC.

[From the Congressional Record—Senate, Nov. 8, 1971]

EQUAL EMPLOYMENT OPPORTUNITIES ENFORCEMENT ACT OF 1971—AMENDMENTS

AMENDMENT NO. 609

(Ordered to be printed and to lie on the table.)

(A copy of amendment No. 609 to S. 2515 may be found on p. 551.)

Mr. Ervin submitted an amendment, intended to be proposed by him, to the bill (S. 2515) to further promote equal employment opportunities for American workers.

AMENDMENT NO. 611

(A copy of amendment No. 611 to S. 2515 to be found on p. 553.)

(Ordered to be printed and to lie on the table.)

Mr. DOMINICK. Mr. President, on behalf of myself, Mr. Baker, Mr. Brock, Mr. Buckley, Mr. Ervin, Mr. Fannin, Mr. Hollings, and Mr. Tower, I introduce for printing and future appropriate consideration an amendment to S. 2515, the Equal Employment Opportunities Enforcement Act of 1971. Essentially, the amendment strikes all language vesting the Equal Employment Opportunity Commission with cease-and-desist powers and substitutes therefor language giving the EEOC power to bring employment discrimination disputes to Federal court for resolution.

The amendment does not affect present bill language which: first, improves the respondent's rights of due process by requiring a 10-day notification of the filing of a Commission charge and a 2-year limitation of back pay liability; second, provides procedures whereby approximately 10.1 million State and local government employees and 2.6 million civil service and postal workers can redress their employment discrimination grievances through Federal district courts; third, expands the coverage of Commission jurisdiction to those private employers of eight or more employees; fourth, does not limit aggrieved employes to only Title VII remedies or limit class action; and fifth, transfers the Justice Department's "pattern and practice" suit jurisdiction and the Labor Department's Office of Federal Contract Compliance to the EEOC.

Mr. President, what this amendment would do is to guarantee the protection of both parties' rights through fair, effective, and expeditious Federal court machinery. It would avoid the legendary vicissitudes or presidentially appointed boards and vest adjudicatory power where it belongs—in impartial judges shielded from political winds by life tenure. Judges who render their decisions in a climate tempered by judicial reflection and supported by a historical judicial independence influenced only by stare decisis. This amendment permits the aggressive and active advocacy of equal employment opportunity

Calendar No. 412

92d CONGRESS
1st Session

S. 2515

IN THE SENATE OF THE UNITED STATES

NOVEMBER 8, 1971

Ordered to lie on the table and to be printed

AMENDMENTS

Intended to be proposed by Mr. DOMINICK (for himself, Mr. BAKER, Mr. BROCK, Mr. BUCKLEY, Mr. ERVIN, Mr. FANNIN, Mr. HOLLINGS, and Mr. TOWER) to S. 2515, a bill to further promote equal employment opportunities for American workers, viz:

On page 33, after line 24, insert the following:

"SEC. 4. (a) Paragraph (6) of subsection (g) of section 705 of the Civil Rights Act of 1964 (78 Stat. 258; 42 U.S.C. 2000e–4) is amended to read as follows:

"'(6) to refer matters to the Attorney General with recommendations for intervention in a civil action brought by an aggrieved party under section 706, or for the institution of a civil action by the Attorney General under section 707, and to recommend institution of ap-

pellate proceedings in accordance with subsection (j) of this section, as redesignated by section 4(d) of the Equal Employment Opportunities Enforcement Act of 1971, when in the opinion of the Commission such proceedings would be in the public interest, and to advise, consult, and assist the Attorney General in such matters.'

"(b) Subsection (h) of section 705 of such Act is amended to read as follows:

"'(h) Attorneys appointed under this section may, at the direction of the Commission, appear for and represent the Commission in any case in court, except that the Attorney General shall conduct all litigations to which the Commission is a party in the Supreme Court or in the courts of appeals of the United States pursuant to this title. All other litigation affecting the Commission, or to which it is a party, shall be conducted by the Commissioner.'"

On page 34, beginning with line 1, strike out through the end of the parenthetical in line 3 and insert in lieu thereof:

"(c) Subsections (a) through (e) of section 706 of such Act."

On page 38, beginning with line 7, strike all through line 7, page 50, and insert in lieu thereof the following:

"(f) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Com-

mission has been unable to obtain voluntary compliance with this Act, the Commission may bring a civil action against the respondent named in the charge. If the Commission fails to obtain voluntary compliance and fails or refuses to institute a civil action against the respondent named in the charge within one hundred and eighty days from date of the filing of the charge, a civil action may be brought after such failure or refusal within ninety days against the respondent named in the charge (1) by the person named in the charge as claiming to be aggrieved or (2) if such charge was filed by an officer or employee of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) of this section or further efforts of the Commission to obtain voluntary compliance."

74-699 O - 72 - 37

stituting what we believe is a fast, a fair, and a more efficient procedure—the EEOC hearing procedure—for the logjammed Federal courts, with their lengthy delays and great time consuming judicial processes, this will provide due process of law because the prosecutor and the judge are two distinct entities. So that this amendment, in a nutshell, would simply provide that the prosecutor and the judge not be the same person, shall not be in the same line of command, and shall not be responsible to the same people.

This amendment would give the President the right to name an independent EEOC General Counsel who would report solely to him. It would be his duty and his function to decide what cases to prosecute and what cases not to prosecute from the cases presented to him where injustice is alleged on the basis of race, color, creed, or sex. This would assure that once the prosecutor makes the decision to prosecute on the basis of discrimination, the judge and the jury in this case would be separate and distinct and will be, in effect, the new Equal Employment Opportunity Commission.

I can think of no better way to insure that the new and hopefully faster, more efficient system in S. 2515 will operate justly toward all Americans. Our amendment will protect the parties on both sides of the dispute and assure that the prosecutor and the judge come from two different appointment procedures and have two different responsibilities. In this case the prosecutor goes directly to the President himself for his appointment, and for advice and consent of the Senate.

This is a fair amendment. It is in keeping with our Nation's judicial history, judicial customs and our judicial system. It makes crystal clear the fact that we are tryng to achieve, by this bill, and this amendment, a fast, efficient, and fair way to determine where alleged injustices exist in our society and to provide a way whereby, once proven to exist, they can be decided expeditiously so that the people most involved will know they can get a quick and fair hearing, for "justice delayed is justice denied."

I urge, Mr. President, the adoption of this amendment giving to the Equal Employment Opportunity Commission under our bill a new independent General Counsel's Office.

The PRESIDING OFFICER (Mr. Gambrell). The question is on agreeing to the amendment of the Senator from Ohio.

Mr. WILLIAMS. Mr. President, I first want to state that, as manager of the bill, I am in agreement with the amendment which has been offered by the Senator from Ohio and fully explained by the Senator from Pennsylvania. It will make a substantial contribution to the substance of this legislation. It certainly meets many of the anxieties felt about the bill as it now exists.

This amendment calls for the establishment of a General Counsel's Office in the Equal Employment Opportunity Commission, which, though a part of the Commission and empowered to act in its name is to be independent of its control. The purpose of the amendment is to insure that the prosecutorial and decisional functions of the Commission will be firmly separated and to eliminate any lingering notion that the Commission would be involved in a conflict of acting as prosecutor and judge.

Under the scheme of the Civil Rights Act of 1964, the Commission was established as an investigative body to facilitate a statutory scheme

then the powers to decide whether or not the violations are in fact in existence, and if they are, to issue appropriate judicial orders.

We used to have a word for this in the old English common law. They used to call it a Star Chamber proceeding, where one person or one group would have the power to issue the rules, decide whether there has been a violation, and then impose the punishment. That is exactly what the cease-and-desist procedure would do.

It seems to me it is far more beneficial, from an overall governmental policy standpoint, to separate these functions just as we have them in the three branches of Government under the federal system. Second, it also seems to me that looking at it from the point of view of those who feel that they have been discriminated against, they are going to get a much more objective hearing before the courts than they would before this particular body, the EEOC, and that they will get a much more expeditious hearing. As I believe, has probably been pointed out already by the distinguished manager of the bill, the EEOC now, without cease-and-desist authority and without the additional coverage provided by this bill, is 32,000 cases behind, with over a 20-month backlog, in determining and resolving unlawful employment practices. I do not care who it may be, or how long they may have been claiming discrimination, if they have to wait 20 months before they even find out whether or not the Commission feels that the charge is valid, all one can say is that justice delayed is justice denied.

The average backlog of the Federal district courts at the present time is about 12 months. So my amendment would immediately speed the process of justice up by 8 months by tranferring these matters to the Federal district courts, rather than keeping them within the Commission, even if there were no additional employees put within the jurisdiction of the Commission.

We have, however, greatly enlarged the Commission's jurisdiction. We are adding approximately 10.1 million State and local employees, 6.5 million private employees of small employers, and 4.3 million educational employees. Thus, we are talking about an expanded coverage of approximately 21 million-potential aggrieved.

Interestingly enough, there has been a trend in recent EEOC investigations concerning alleged discriminatory cases involving sex discrimination. Are women being given unfair treatment or, conversely, are they being given preferential treatment? In either situation, the person who feels aggrieved has charged sex discrimination and is bringing these cases before the EEOC at the present time. Additionally, there will be the need, under cease-and-desist powers if they are left in the bill, for the training of hearing examiners who will have to set up special courts or special hearing rooms within the Commission. These hearing examiners will need to be trained in the subtleties of what is or is not discrimination. It will take almost 2 years to get the necessary number of trained people on board in order to accomplish these demands. Each one of these factors, as I see it, simply adds to the problems of discrimination in employment and frustrates the resolution thereof.

One thing that I think all of us in this body, regardless of who we are, would like to get rid of is discrimination, particularly when it involves something as essential as someone's livelihood. My feeling,

to put employees holding their jobs, be they government or private employees, on the same plane so that they have the same rights, so that they have the same opportunities, and so that they have the same equality within their jobs, to make sure that they are not being discriminated against and have the enforcement, investigatory procedure carried out the same way.

I do not see the difficulty in that concept. So I would say once again that any thought that this amendment is anti-employee or anti-civil rights is plain ridiculous.

I know that there are many people, including the manager of the bill, who disagree with my approach, and who perhaps think that it will clog the courts. I must say, that although those arguments can be made, with 93 courts already established, and with the independent General Counsel that has just been created for the EEOC itself, we would now have the legal machinery to move rapidly on the enforcement of whatever legitimate complaints may come before the EEOC which cannot be solved by conciliation.

So, once again I would urge that, on the merits, this particular amendment be adopted.

Mr. President, just a few minutes ago I was talking about the caseload that the Commission has. I think it might be worthwhile to get all these facts initially in the record at this point.

Chairman Brown of the EEOC testified that as of June 30, 1971, the Commission had a backlog of 32,000 cases. It anticipated that a load of 32,000 new cases would come in fiscal year 1972, and 45,000 in fiscal year 1973.

As of February 1971, almost a year ago, EEOC complaints required from 18 to 24 months for disposition.

To this already substantial backlog, we must add the impact of the more complex and time-consuming cease-and-desist procedures as they are maintained in the bill.

Mr. President, we must also consider expanded coverage. Included for the first time in the expanded coverage, as I pointed out, are approximately 6.5 million employees of small employers—those employing between eight and 25 employees; 4.3 million educational employees—teachers, professional and nonprofessional staff members; and 10.1 million State and local governmental employees whose disputes are to be conciliated prior to going to the Attorney General for court action, as I pointed out just a little while ago.

Thus, the EEOC will be responsible for an additional 21 million potential aggrieved personnel.

Now it seems to me that if we look at this in any kind of logic, and with real care, we can see immediately that the added load will require not only a great increase in administrative staff in the EEOC but is also going to mean a much longer backlog before any case can be decided.

As I said earlier, it seems wrong to me to say to an aggrieved employee, "Certainly we will hear your case. We will do the investigating. We will bring the charges. We will do everything else, but you will not get a decision for over 2 years." That is not justice. This is not equal employment opportunity. But if we have the investigator saying that this is a legitimate complaint, and that it will be brought to the district court and will get priority treatment there, we can get the matter decided in half the time it would take in any other way.

language. My amendment does not affect present bill language which improves the respondent's rights of due process by requiring a 10-day notification of the filing of a commission charge or the 2-year limitation of back pay liability. It does not affect bill language whereby approximately 10.1 million State and local government employees can seek redress of their grievances through Federal district courts. This amendment does not change a committee-adopted amendment authored by Senator Cranston and me creating machinery suggested by Clarence Mitchell, director, Washington Bureau, NAACP. The machinery provides a remedy procedure for the approximately 2.6 million civil service and postal workers whereby an aggrieved employee has the option, after exhausting his agency remedies, of either instituting a civil suit in Federal district court or continuing through the Civil Service Board of Appeals and Reviews to district court, if necessary. Curiously enough, the majority members of the committee seem pleased with ultimate court enforcement procedures for 2.6 million Federal employees and 10.1 State and local government employees, but continue to urge cease-and-desist procedures for private employees.

Why this is not discriminatory in and of itself, I find hard to realize.

The amendment does not affect the expanded coverage provisions in the bill concerning small employers, State and local government employees, or educational institution-employees. Additionally it leaves undisturbed S. 2515 language transferring Justice Department "pattern and practice" suits and Labor Department's Office of Federal Contract Compliance to the EEOC. Finally, the amendment does not limit aggrieved employees to only Title VII remedies or bar class action suits.

My understanding is that amendments on all these points will be brought up at a later date for decision by the Senate, but this amendment does not affect any of them.

What the amendment does do is to provide for trial in the U.S. district courts whenever the EEOC has investigated a charge, found reasonable cause to believe that an unlawful employment practice has occurred, and is unable to obtain voluntary compliance. The Commission would have complete authority to decide which cases to bring to Federal district court and those cases would be litigated by Commission attorneys. Once a Federal district court had issued a decision and order in a case, appeals litigation in a U.S. Court of Appeals or the U.S. Supreme Court would be conducted by the Attorney General's office. An aggrieved person whould retain the right to commence his own action in Federal court if the EEOC dismissed his charge.

This amendment protects the rights of both respondents and aggrieved by providing a fair, effective, and expeditious resolution of the dispute.

I might point out here, Mr. President, that my amendment simply takes the enforcement procedure down one level in the court system and out of the hands of the executive agency. The enforcement procedures, as the bill proposes, puts adjudicatory power in the hands of the the executive agency with appeal to the court of appeals. What we are doing is avoiding star chamber procedure in the executive agency system, which has not worked in the past and which we do not believe will work in this situation.

Whereas the court approach preserves the traditional separation of powers which we as a nation so highly cherish, the cease-and-desist procedure seriously threatens the respondent's due process rights in a star chamber procedure which joins the prosecutory function with the adjudicatory function. Under a cease-and-desist proceeding the EEOC would investigate the charge, issue the complaint, prosecute the complaint, adjudicate the merits of the case, and seek enforcement of its decisions in the U.S. Circuit Courts of Appeals. Elemental concepts of fairness and due process require an impartiality in the adjudicatory function which could not be attained under S. 2515, but could be under my amendment if agreed to.

This amendment provides a combination of the expertise of the EEOC in investigating, processing, and conciliating unfair employment cases with the expertise and independence of the Federal courts. An expertise, which as I mentioned earlier had exhibited unusual understanding of the rights of minorities in areas of public accommodations, voting rights, education, housing and equal employment. The equal unemployment area is one which produces strong emotions among all parties— those discriminated against, those accused of discriminating, and even those charged with enforcing the law. I believe that these strong emotions should be tempered by restraint when the adjudication of personal rights is at issue. The Federal courts are best able to provide the tempering restraint which will allow for a rational resolution of the issues of any given case.

Mr. President, to interpolate for a minute, as I reported yesterday, my recollection of the evidence is that approximately 30 percent of the cases which are being filed now—at least in excess of 20 percent are related to sex discrimination. And when we get an angry woman who feels she has been discriminated against in her job or in getting her job, we have really got emotions running high. And we have the same situation involved when a man is being discriminated against or thinks that he is being discriminated against because he is not a female. These are matters that go on and on and on. They get much more difficult to handle through voluntary compliance or an executive agency level than if we had some totally impartial method of solving the disputes.

In my opinion, we do not get adequate impartiality with cease-and-desist orders or with the EEOC having the untrammeled discretion to impose unreasonable employment relation requirements. Everybody is mad.

If we have an impartial court proceeding, we would have much faster action, much more impartiality, and some ability to temper the heat of the issues involved.

As I ponted out, effective protection of the rights of both the employer and the employee demands a speedy resolution of the dispute. Facts in addition to the previously discussed backlog problems indicate that the court enforcement procedure is more expeditious as it involves a one-step enforcement procedure whereas the cease-and-desist order requires two steps. A district court order is immediately self-enforcing as it is backed by court contempt proceedings. A commission cease-and-desist order must be brought to the court of appeals before it achieves similar sanction power. Additionally, there is a definite practical advantage in having the judge who enters the orig-

such as we here encounter. The district courts are experienced in handling civil rights matters, having in recent years dealt effectively with a broad spectrum of civil rights cases, including those involving employment discrimination.

And adjudication by the Federal courts will provide the consistency and continuity which is a vital element of our judicial process.

Court enforcement, therefore, offers a more fair and equitable representation of the interests of both employee and employer. In addition, court enforcement offers a more expeditious settlement, and a speedy resolution is vitally important both to an aggrieved employee and to a respondent employer.

Presently the EEOC has an enormous backlog of cases under investigation, and the disposition of a complaint requires from 18 to 24 months. S. 2515 adds 6.5 million nongovernmental employees and 10.1 million employees of State and local governments to the EEOC's jurisdiction, so obviously the backlog of investigations and the time required for processing them can be expected to increase in the future. If the Commission is given cease-and-desist authority, the time required for completion of the adjudicatory process will obviously be considerable—and it must be remembered that the cease-and-desist order must be brought to a Federal court of appeals before it achieves a sanction power similar to that of the order a district court judge would enter at the end of a court enforcement process.

In 1970, the median time interval from issue to trial in nonjury cases in U.S. district courts was 10 months. Clearly, this avenue offers the aggrieved employee and the respondent employer a faster answer to his problem. Furthermore, it is relevant to consider that this prospect of swift resolution in court should encourage settlement by conciliation of a larger percentage of cases, thereby helping the Commission handle its tremendous investigative and conciliation responsibilities more quickly.

If the resolution of employee discrimination cases is fairer and faster under the court enforcement procedure, what possible reason is there to depart from this traditional means of administering justice in the United States? Proponents of the cease-and-desist authority lean heavily upon the arguments which have been advanced in granting this authority to executive agencies in other areas: First, that a special expertise in a technical field is required of the adjudicating officer; and second, that putting such cases in the Federal courts would clog the Federal judiciary system. Neither argument stands up in this case.

Civil rights is not a highly technical area. It is a matter of human understanding and common sense, qualities possessed as fully by Federal judges as by potential nominees to the EEOC.

The district court judges have shown in recent years their capacity to resolve civil rights disputes in areas such as housing, public accommodations, and school integration. Furthermore, because of the respect with which the Federal judiciary is viewed, their decisions have greater immediate impact and moral sanction than would the decision of an executive administrative agency.

I see no way that the court enforcement procedure would clog the Federal courts. There are 398 Federal district judges to hear those cases which the EEOC does not resolve by conciliation. In fiscal year 1970, only 732 of 20,122 charges received by the EEOC failed a solu-

discrimination in employment and to try to resolve grievances through conciliation procedures. The Commission had no mandate to enforce fair employment practices and I believe that deficiency should be remedied.

In restructuring the functions of the Commission, I feel that we should have two goals in mind—the establishment of a procedure which is both fair and efficient.

The public is entitled to have its business handled by Government in an efficient manner. One of the criticisms most often aimed at administrative agencies is that they are notorious in their inefficiency in handling the caseload before them. For example, it has been estimated that the median time in days elapsed in processing NLRB unfair labor practice cases, from filing to decision, amounted to 323 days in 1970. The present EEOC complaint disposition requires from 18 to 24 months. I do not feel that it is fair for the Government agencies to keep either respondents or complainants waiting years before matters in which they are vitally interested are disposed. In restructuring Government agencies such as the EEOC it is incumbent upon Congress to show some imagination to fashion procedure that will provide for a speedy resolution of pending business.

Equally important is that the procedures be equitable. Fundamental to our system of justice is fairness. In our desire to achieve equal employment opportunity we must be fair to both the respondent and complainant. We cannot forsake the principle that anyone charged with violating the law is presumed innocent until proven guilty. He is entitled to be tried by an impartial tribunal. This calls for a disinterested party sitting as the judge of the case. The policeman and the prosecutor cannot sit as judge. If fairness is to be achieved, we must divide the function of prosecution from the function of adjudication.

My objection to S. 2515 as written is not with its objective but with its proposed means for achieving the stated end. Under S. 2515 the EEOC would be able to issue a complaint, to conduct hearings, to issue cease-and-desist orders, and to include in an order such things as demands for reinstatement for back pay, or for the company to report regularly to EEOC on how it is complying with the order. This approach is not fair in that it gives the EEOC czar-like powers of policeman, prosecutor, judge and jury. It violates the fundamental demand for separation of these powers.

Nor would efficiency be served under the provisions of S. 2515. If the EEOC is unable to handle the case load under the present arrangement, there seems little likelihood it could expeditiously dispose of additional responsibilities. It would take an enormous number of new employees and attorneys to handle this case load and it could easily take as long as 3 years before a case is disposed.

In the alternative, the Dominick proposal to empower the EEOC to sue in district courts when conciliatory efforts fail would achieve the objective of strengthening enforcement of equal employment opportunity under a fair and efficient procedure. Fairness is promoted under the district court approach by separating the functions of the policeman, the prosecutor, and the judge. A fair trial and due process are guaranteed to the accused.

Carolina (Mr. Ervin) described the amendment best when he characterized its contribution toward an equitable enforcement procedure as being similar to starting off on the lengthy trip to heaven by stopping off at the first saloon on the way. I personally voted for the amendment because it does represent a first step, albeit into the saloon, toward impartial court enforcement of unlawful employment practices.

It is a step into the saloon, though, as it misleads many people into believing that an independent General Counsel actually will cure the defects and inequities of cease-and-desist enforcement. I submit that it will do no such thing. Its chief accomplishment will be to provide salve for the conscience of cease-and-desist proponents and throw a rather skimpy bone to respondents whose due process rights will continue to be violated.

An independent General Counsel is not the panacea for cease-and-desist enforcement because it does not even address itself to crucial problems inherent in the mechanism which frustrate employment grievance resolution.

Perhaps the most crucial defect the cease-and-desist mechanism promises is administrative snarls and unconscionable backlog delays. I say "promises" because use of a weaker verb would be misleading. What else can you expect from a system faced with an expanded jurisdiction of approximately 21 million potential aggrieved, substantial new "pattern and practice" and Federal contract compliance responsibilities, more complex and time consuming proceedings, only one available tribunal to issue cease-and-desist orders, and a staff lacking approximately 100 trained trial examiners, when the present Commission backlog is over 32,000 cases and approximately 20 months on just investigation and conciliation cases? Contrast this with an existing Federal district court system of 93 courts and 398 judges with established reputations for fairness, discretion and impartiality and a present median backlog, according to the most recent figures available, of 10 months from issue to trial.

Additionally, utilization of the courts as initial adjudicators of Title VII actions will substantially increase the likelihood of voluntary settlements and thereby reduce the number of cases presented to the courts.

The imminence of court action, coupled with the threat of adverse publicity and immediately enforceable orders will serve as a powerful inducement to voluntary settlements.

A further factor that must be considered when determining the expediency of the two procedures is the effectiveness of the enforcement order. The independent General Counsel does not address itself to the defects in the cease-and-desist procedure which requires a two-step enforcement. The district court makes decisions and renders appropriate orders immediately enforceable by contempt citations issued by a person knowledgeable of the facts—the judge who heard the case and entered the order. On the other hand, a reluctant respondent who disregards a Commission-entered cease-and-desist order cannot be compelled to comply with the order by the Commission. Instead, the Commission must petition an appropriate U.S. Court of Appeals, file the Commission hearing record, and then prove that their findings are supported by substantial evidence in the record before a

judge not familiar with the case enforces an order that he originally had no part in entering. Now the reluctant respondent is subject to contempt proceedings if he disobeys the Court of Appeals dictates. If the Commission wants to avoid showing that the findings are supported by substantial evidence in the record, they can wait for 60 days after the issuance of the order, at which time their findings are recognized by the Court as being conclusive.

This, in and of itself, puts enormous power in the hands of the Commission.

The ineffectiveness of the two-step cease and desist enforcement procedure and its concomitant delay is best put into perspective when one realizes that with a similar enforcement procedure under the National Labor Relations Board, more than 60 percent of the enforcement orders in fiscal year 1967 had to go to the court of appeals. Arnold Ordman, past General Counsel of the NLRB, told the Separation of Powers Subcommittee on March 29, 1968, that the number of Board decisions proceeding to the courts of appeals were increasing from the 54.3 percent in fiscal year 1973. Contrast these figures with the 1969 annual report of the Director of the Administrative Office of the U.S. Courts which indicates that only 7 percent of all U.S. district court decisions were appealed. However expeditious and effective cease-and-desist orders may be, if almost two-thirds of the disputes must ultimately be taken to the court of appeals, it seems obvious that they are not getting the quick resolution of the dispute that is considered to be necessary by the people who are supporting this bill.

Also these figures present the most convincing testimony possible concerning the public's confidence in decisions rendered by politically appointed boards. The public generally and the respondents specifically realize that these quasi-judicial decisions are quite often politically inspired and as such will not stand up to the nonpartisan judgment of the courts of appeals. On the other hand, public confidence in Federal court judges utilizing stare decisis is such that approximately only one out of 15 of their decisions is appealed.

If the Senate is truly interested in an effective, expeditious grievance resolution procedure we should place our trust in our Federal court system. Although cease and desist promises much, a shiny new administrative procedure designed to redress grievances is no better than its performance, and if it requires 2 to 3 years to achieve justice, its potential is nothing but a frustrating promise of what might have been.

Our Federal court system provides an established forum of known performance. Let us not gamble with the rights of both respondents and aggrieved on a most suspect administrative procedure when we can rely on our court system.

Another cease-and-desist defect which the independent General Counsel fails to remedy is that of increasing concentration of Executive power. As I mentioned last Friday, legislative concessions of power—in this case a clearly judicial function—to the executive branch threatens concepts of separation of power and checks and balances which our Founding Fathers thought imperative to our tripartite system of government. It seems incongruous to me for my colleagues to continually complain about the excessive abuses of power exercised

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Mr. WILLIAMS. Well, if it is in support of the amendment, the Senator can seek the generosity of the Senator from Colorado. What is the Senator's wish?

Mr. ERVIN. I wanted to ask the Senator if this bill does not extend the coverage of this act——

Mr. WILLIAMS. Fortunately, yes.

Mr. ERVIN (continuing). To millions of additional employees of private industry, and at least 10 million employees of States and local subdivisions of States.

Mr. WILLIAMS. I say gratefully, yes.

Mr. ERVIN. It also enables the political hands of Caesar to be laid upon the sacred things of God. And each one of these cases where any of these things occur is subject to be reviewed in the Federal courts, is it not?

Mr. WILLIAMS. I would say that equality of rights has nothing to do with Caesar, and maybe had more to do with God.

Mr. ERVIN. I would say you do not get equality of rights by robbing the majority of their rights, and that is what this bill will do to the majority of the people of this country. But apart from that——

Mr. WILLIAMS. I do not think any one has a right to discriminate against a person because of religion, race, sex, or national origin.

Mr. ERVIN. I do not think Congress has a right to authorize Caesar to lay his political hands upon the affairs of God and that is exactly what this bill does.

Mr. WILLIAMS. I interpret God's mandate to man differently than the Senator from North Carolina.

Mr. ERVIN. But apart from that question, every one of the cases that arises affecting any one of the millions of additional employees of private industry which are brought under the bill and the more than 10 million State and local employees would be subject to be reviewed by the Federal courts under the bill in its unamended form, would they not?

Mr. WILLIAMS. The appeals procedure is here, and the court of appeals is written in clearly as the court of review.

Mr. ERVIN. So this will increase rather than diminish the cases in the Federal courts, regardless of whether the amendment of the distinguished Senator from Colorado is adopted or rejected, will it not?

Mr. WILLIAMS. The Senator, of course, knows that Chief Justice Burger was referring to the case load in district trial courts.

Mr. ERVIN. Which goes to show that when a man gets to be a Federal judge he is just like every other man who gets a Federal job: The first thing he wants to do is have his duties lightened, and the next thing he wants is to have his salary increased. This shows that Federal judges are as human as other people.

Mr. WILLIAMS. I am not going to argue that. When we look at the caseload of the district courts, which has been included in the Record at the request of the Senator from New York, I am not proud of the fact that from the inception of a case in the State of New Jersey to its conclusion, the time has now reached 29 months. I am not proud of that. Justice delayed, it has been said by wiser authorities than this Senator, is justice denied. Twenty-nine months is a long, long time in the district courts of the State of New Jersey.

I will state that in the State of North Carolina, in the eastern district, 20 months is the time from the filing of an action to a decision in the case, and that is too long.

But be that as it may, with time running, I have no further requests but to say, without yielding back the few minutes that I might have, Mr. President, that it is suggested here, in support of this amendment, by some of the debaters, that we are introducing a monstrous and unfair procedure in this area of equal employment opportunity. This is so far from what is being done by the legislation. A time honored procedure for enforcement, with all the protections for due process and fairness included, is exactly what we have done, a method that is being used in all the other administrative agencies of importance, that is being used in 34 of the 38 States that have human rights commissions and have a guarantee that there will be equal employment opportunity.

So it is far from anything new. What this proposes is that the Federal protections, constitutional protections, of equal opportunity be given the same enforcement procedures in the administrative agencies that exist in all the economic agencies of the Federal Government, that exist in most of the States that have human rights commissions or divisions or sections.

Mr. DOMINICK. I yield myself 3 minutes.

Mr. President, I want to make some brief points. I have listened very carefully to the proponents of the system as is presently contained in the bill—namely, the cease-and-desist authority. So far as I can see, they say that a court enforcement system would take longer and that cease and desist has been used in other cases, and therefore we ought to use it for equal employment.

I do not think either one of these is a very compelling argument, because we have testimony—which I have already referred to—that indicates that there is now a backlog of more than 20 months in the EEOC, just on compliance and mediation cases. If you expand their jurisdictional control by 21 million people, expand the procedural complexities by giving them cease-and-desist authority and say they are going to need 100 attorneys or more—about which we have testimony—and they are going to do it all within their one agency, you obviously are not going to have 20 months' delay but more than 3 years' delay.

In addition, facts I presented indicate that cease and desist procedures stimulate circuit court of appeals procedure, so you have just as much a burden, if not more in the circuit courts, as you would if they originated cases in the district courts as my amendment does. I think that argument is not supported by the facts.

The second point is that in the discussion of this bill in committee, we considered what should be done about State and local employees, and we gave them a right to proceed through the Attorney General into the court system and not be subject to cease-and-desist orders. We gave the Federal employees the right to go through their agency and then go either to the Civil Service Commission Board of Appeals and Reviews or to the court. But in the case of private employees, this bill says that they cannot use the court system; they cannot be like the other people covered under this bill. They will have to redress their grievances through the cease-and-desist machinery without ever getting to the district court.

filed with the Commission within 30 days after the expiration of any period of reference under subsection (c) or (d), the Commission has been unable to obtain voluntary compliance, the Commission may bring a civil action.

Whereas the language of the present amendment gives the Commission the discretion to file an action, this language requires that the Commission "shall" bring a civil action.

Without trying to be too technical or too difficult about it, I believe that "shall" defeats the purpose of the 30-day delay which is simply designed to try to get, as they say in the delivery business, "a burr under the tail" of the parties. But I do not see why we should require them within 30 days to bring suit. They might be able to accomplish voluntary compliance within 40 days or it might take 32 days, but under the language of this amendment what happens if they do not file suit within 30 days? Then what do we do?

In other words, I think that the word "shall" in the second line of the Senator's amendment should be changed back to the word "may," as is the case, if the Senator will look through his amendment, to the question of whether the person aggrieved is going to sue or not going to sue.

I would therefore ask the Senator whether he would be amenable to changing that?

Mr. JAVITS. May I point out that the reason we included "shall" is, in a sense, that it goes with the original bill. If the Senator will be kind enough to refer to page 38 of the bill, subsection (f), which deals with this particular matter, he will see that it says:

> (f) If the Commission determines after attempting to secure voluntary compliance under subsection (b) that it is unable to secure from the respondent a conciliation agreement acceptable to the Commission, which determination shall not be reviewable in any court, the Commission shall issue and cause to be served upon any respondent not a government, governmental agency, or political subdivision a complaint stating the facts upon which the allegation of the unlawful employment practice is based, together with a notice of hearing before the Commission, or a member or agent thereof, at a place therein fixed not less than five days after the serving of such complaint. In the case of a respondent which is a government, governmental agency, or political subdivision, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court.

In other words, having found reasonable cause, the Commission, according to the original bill, is required to serve a complaint, and so forth.

Mr. DOMINICK. May I continue to point out that what we are trying to do whenever we can is to have the unlawful employment practice charge solved by voluntary compliance. I think that all of us would prefer to see this rather than a commission filing a cease-and-desist order, or as in my amendment, having to go to court. I point out to the Senator that although the word "shall" is in subsection (f) on page 38 of the original bill, the difference between that situation and the one posed by the amendment which I have prepared is the fact that there is no time limit in subsection (f) in which the Commission has to determine when voluntary compliance is or is not possible. So that there is no 30-day limit. All I am saying is that we are putting a 30-day limit where we are saying, "OK. If you have not settled by that time, we have the right to go to court."

It would seem to me that in the interest of flexibility of the Commission's schedule, and in the interest of flexibility in working something out through voluntary compliance, it would be far better to put in the word "may."

If the Senator from New York will change that word "shall" to "may," I shall be happy to accept the amendment.

Mr. JAVITS. May I ask this of the Senator: If we do that, if we change the word "shall" to "may," do we not have to have some cutoff time as far as the Commission is concerned, with respect to its exercise of that discretion in bringing a civil action assuming, for example, of the Senator's amendment—if within 30 days after a charge is filed with the Commission or 30 days after a period of reference in subsection (c) or (d)—this relates to State and local governments references and the Commission has been unable to obtain compliance, the Commission may bring a civil action. Would not the Senator agree that if we are going to adopt that suggestion, that we leave it at "may," we have to put some termination date upon the Commission itself so that the complainant may sue without necessarily sitting around awaiting 6 months.

Mr. DOMINICK. I had thought that we then go on with the rest of the Senator's amendment. We can shorten the 180-day private filing restriction as far as I am concerned, but I think we should keep in mind that this is a Commission which has been appointed for the purpose of trying to solve any employment discrimination that there may be and, consequently, I do not think that we should assume they will not take action where there is a clear case. Problems will arise where there are gray areas, or where they are not sure whether they have substantial evidence to support a case. Under those circumstances, it would seem to me that we should give them more time. If we want to say 90 days from the filing of such a charge, or on the expiration of any period, instead of 180 or 120, that is all right with me. If the Senator would do that, then we are changing the timetable which the committee has already worked out in the process of trying to determine what should be done with enforcement procedures.

Mr. JAVITS. In view of the disposition of the Senator to come to some agreement on this amendment, so that we shall not proceed improperly, I should like to suggest the absence of a quorum, if that is agreeable, and we will take a short quorum break, with the time being charged to both sides, so that we can do our best to work out some language which will carry out our intentions, in view of the fact that, in principle, the Senator thinks there is equity to this amendment.

Mr. DOMINICK. That will be fine with me.

Mr. JAVITS. Mr. President, I ask unanimous consent that I may suggest the absence of a quorum with the time to be charged equally to both sides.

The PRESIDING OFFICER (Mr. Roth). Without objection, it is so ordered.

Mr. JAVITS. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. JAVITS. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. JAVITS. Mr. President, I modify my amendment by changing the word "shall" in the second line to "may."

The PRESIDING OFFICER. The amendment is so modified.

Mr. JAVITS. Mr. President, the reason for the modification is that I do not feel, with an agency of this character, that the word "shall" would have any greater meaning than the word "may" and also because I feel the Commission shoud not, in view of its purpose, be under the kind of strict timetable within the parameters, of course, that the amendment sets out that it would otherwise be if we left the word "shall" which is mandatory. We assume that they must obey the law in the amendment.

We have retained the greater good for the interest of the person aggrieved the ability to sue, which is the main point. That is being retained in the amendment as modified and I think this is the desirable way in which to proceed.

If the Senator from Colorado is satisfied I am prepared to yield back my time and allow action to take place on this amendment to the amendment.

Mr. DOMINICK. Mr. President, I yield myself 2 minutes.

I appreciate the courtesy of the Senator from New York. I think this change is very meritorious, as I pointed out in my first statement. I do not think the Commission should be mandated on what date an agency should bring suit when we are trying to work out matters the best we can by conciliation.

As a result, with the word "may" instead of "shall" and having preserved the right to the Commission to file suit and the respondent if he does not feel the Commission acted properly, it would seem proper to proceed in this way. Therefore, I have no objection to the adoption of the amendment as modified.

I yield back my time.

Mr. JAVITS. I yield back the remainder of my time.

The PRESIDING OFFICER. All time has been yielded back. The question is on agreeing to the amendment of the Senator from New York, as modified.

The amendment, as modified, was agreed to.

Mr. JAVITS. Mr. President, I move to reconsider the vote by which the amendment, as modified, was agreed to.

Mr. BYRD of West Virginia. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. JAVITS. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. WILLIAMS. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. WILLIAMS. Mr. President, I send to the desk an amendment and ask that it be stated.

The PRESIDING OFFICER. The clerk will state the amendment.

The legislative clerk read the amendment to the amendment of the Senator from Colorado (Mr. Dominick), as follows:

On page 3, line 3 of the Dominick amendment strike "the respondent named in the charge" and substitute in lieu thereof: "any respondent not a government, governmental agency, or political subdivision named in the charge. In the case

Despite voluminous rhetoric to the contrary, my convictions that U.S. District Court enforcement provides employees and potential employees with the fairest, most effective redress of their grievances remain unshaken.

The most rational argument against court enforcement is the potential delay threatened by backlogged Federal courts. I acknowledge this problem and remedy it by incorporating in this amendment priority language from the same Civil Rights Act of 1964 that created the Commission. Pursuant to language contained in Title I—voting rights, Title II—public accommodations, and section 707—"Pattern or Practice," and included in this amendment, unfair employment practice suits will be accorded priorities in hearing and determination before Federal court judges. Upon certification that the case is of "general public interest," the case would be assigned for hearing and subsequent determination "at the earliest practicable date" before a three-judge panel with appeal to the Supreme Court. In the event the petitioner does not certify the case as being of general public interest, it would be assigned to a district court judge for an expedited hearing.

This newly incorporated language cures any alleged defects in the court enforcement procedures. The final result would be machinery in which the respondent's due process rights will be protected by an experienced, impartial judge relying on stare decisis while the alleged aggrieved is guaranteed an expedited hearing before a Federal forum which has in the past exhibited great compassion for minority rights.

The amendment contains several cosmetic differences from the original amendment as well as one substantial change which reduces the time period within which the Commission may file a civil action against the respondent from 180 to 150 days from the time the Commission first issues its informal charge.

The importance of this amendment should not be underestimated. As it represents my last best offer it signals, insofar as I am concerned, the final effort to resolve the court enforcement cease-and-desist issue while presenting a strong step toward salvaging the entire bill. Previous opponents of court enforcement would be well advised to consider the reasonableness of this amendment versus the very real prospect of no equal employment opportunity enforcement law at all—a most unfortunate and unnecessary consequence.

Consistent with my previous efforts on behalf of employment discrimination enforcement, I shall continue to keep an open mind concerning suggested compromises embodying substantial court enforcement machinery but I have exhausted my own resources, so the future of the bill now lies in the hands of the those who adamantly insist on cease-and-desist powers.

The PRESIDING OFFICER. The amendment will be received and printed, and will lie on the table.

Calendar No. 412

92D CONGRESS
2D SESSION

S. 2515

IN THE SENATE OF THE UNITED STATES

FEBRUARY 7, 1972

Ordered to lie on the table and to be printed

AMENDMENTS

Intended to be proposed by Mr. DOMINICK (for himself and Mr. HOLLINGS) to S. 2515, a bill to further promote equal employment opportunities for American workers, viz:

On page 38, beginning with line 7, strike all through line 7, page 50, and insert in lieu thereof the following:

"(f) (1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall so notify the General Council who may bring a civil action against any respondent not a government, governmental agency, or political

subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such repondent in the appropriate United States district court. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and fifty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the General Counsel has not filed a civil action under this section or the Attorney General in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (1) by the person named in the charge as claiming to be aggrieved or (2) if such charge was filed by an officer or employee of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon appli-

The present situation is quite a hodge-podge. As a matter of fact, it is not to the interests of the employee, nor of the employer, nor of the public that this persist as a condition. It is a disservice to the employee, because of the lack of expeditiousness which should be a very important element in any provision for dealing with a complaint on the basis of discrimination or unfairness in employment practices. It is a disservice to the employer not only on the question of expeditiousness, but also because of the burdens forced on a respondent who is called upon to defend the same case in numerous forums. And it is a disservice to the public which should be entitled to quick, clear, and certain resolutions of these questions.

Because of the number of remedies now available and those provided by this bill, there would be imposed unfairness, a great burden, and expense upon a respondent because simultaneously he could have—and there have been such instances—three or four proceedings before as many different forums pending at the same time. Each of them has the power of subpena. Each of them has the power to gather information from the employer's records and to ask for abstracts of different information, causing a heavy demand on his manpower, on his time, and on his resources. The result is often a disruption within his own business, in addition to the attorney's fees and costs involved.

This whole situation reflects badly upon the effort to induce a respondent to enter into a conciliation proceeding with a view of reaching an agreement either with the State agency or with the EEOC or with the employee himself or herself. Because of this situation we find that the benefits of the procedures that are provided are dissipated to a large degree.

Now, to correct these defects, the amendment at hand would provide that with certain named exceptions a charge filed with the Commission shall be an exclusive remedy for any person claiming to be aggrieved by a particular unlawful practice.

The amendment would remove from the scene the possibility that an individual employee can utilize the possibility of litigating two or more of the multiple actions as to a single offense, as it is now available, whether they are based on a meritorious or a nonmeritorious factual situation. Without such a provision there could conceivably be a presenting of several actions with the effect of blackmail on one or perhaps on all of them on the basis of nuisance value. That is not a good arrangement in a matter of this kind.

Mr. President, I should like to outline what can be done under the present situation in a particular case, because by doing so we can see the necessity for eliminating multiplicity to which reference has been made.

Suppose in the event of a black female employee, there is a denial of either a promotion or pay raise and there is an allegation made that it is because of her color or because of her sex. The first thing she can do is to complain to the union that it is a violation of the collective-bargaining agreement. The union will file or can file a grievance in her behalf. If the union decides that it is not meritorious, it is disallowed.

Then, of course, the employee may file charges against the union and employer with the State fair employment practice agency that invariably has the power of subpena and can call for records, correspondence, papers, and so forth.

Calendar No. 412

92d CONGRESS
2d SESSION

S. 2515

IN THE SENATE OF THE UNITED STATES

FEBRUARY 14, 1972
Ordered to be printed

AMENDMENT

Proposed by Mr. DOMINICK (as a substitute to the amendment (numbered 878) proposed by Mr. WILLIAMS and Mr. JAVITS) to S. 2515, a bill to further promote equal employment opportunities for American workers, viz: Strike out the matter to be proposed and insert the following:

On page 38, beginning with line 7, strike out all through line 18 on page 47 and insert in lieu thereof:

"(f) (1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall so notify the General Counsel who may bring a civil action against any respondent not a govern-

Amdt. No. 884

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ment, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and fifty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the General Counsel has not filed a civil action under this section or the Attorney General in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (1) by the person named in the charge as claiming to be aggrieved or (2) if such charge was filed by an officer or employee of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon appli-

cation by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) of this section or further efforts of the Commission to obtain voluntary compliance.

"(2) In any such proceeding the General Counsel or the Attorney General in a case involving a government, governmental agency, or political subdivision may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the General Counsel or the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of the copy of such request it shall be the duty of the chief judge of the circuit or the

presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

"(3) In the event the General Counsel or the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

"(4) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the

earliest practicable date and to cause the case to be in every way expedited.

"(5) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

"(g) (1) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the plaintiff would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of

title 28 of the United States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

"(2) If the court finds that the respondent has engaged in or is engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without backpay (payable by the employer, employment agency, or labor organization, as the case may be, reponsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Backpay liability shall not exceed that which accrues from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the backpay otherwise allowable."

purposes, to make the Commission an official referee. So that, as is the practice in bankruptcy or where a special master is appointed in a given case, the case is heard, the findings of fact and conclusions of law are offered to the court, and the record is closed, except if a court desires it added to. So we felt that that was a way, especially in the big industrial centers, to cut down the time delay, and that is all our amendment is about.

For all practical purposes, we have gone over to the court method, but we have gone over to it in an effort and with a technique which can cut the timelag very materially.

Frankly, I will not—because I think it is fruitless—be drawn into an argument with the Senator from Colorado about the niceties of the practice in both of these approaches. Though he said that we file a copy of a complaint in court, I point out that that does not represent a proceeding. It represents notice to the court, and no time delay whatever is involved in that.

As to the other niceties of procedure, I do see a major difference in a dependence upon congested court calendars, whether it is a three-judge court or a one-judge court; and that is the step which we are trying to abbreviate, without in any way jeopardizing the rights of the parties who are protected before the hearing examiner by the Administrative Procedures Act and the review of the court which is bound to ensue in our case. There is no other way, because the court can issue the decree.

Again I point out that you are dealing with such long delays in the courts that justice deferred is justice denied. It is interesting to compare the time relationships to the statute itself.

Let us understand that we are dealing with a round period of approximately 150 days, that that is the allowable time for the Commission to move into a given situation. The first 30 days represents an effort to conciliate, making a total of 6 months. So that is the Commission operation. At the end of 6 months, it becomes plenary. Looking down the list of these delays in all the court cases, we find that the average is 17 months. As you go down the circuits in the individual district courts—and that is where the overwhelming majority of these cases will lodge—it is simply appalling; because in the courts where you are going to have the major cases and the congestion in the great industrial States, the delays are in excess of 18 months. In my own State of New York, for example—I say this with tears—there is a delay in the Second Circuit, in the southern district, which is the primary business district, of 35 months in civil cases.

As you go down the list, what do you find? Massachusetts, an industrial State, 19 months. New Hampshire, which is not an industrial State, 14 months. Rhode Island, another industrial State, 18 months. Connecticut, another industrial State, 27 months. The State of New York, practically all industrialized, no less than 18 months; and that is in the western district, around Buffalo; and 35 months in the southern district, which is the major district. New Jersey, an industrial State, 29 months. In Pennsylvania, a major industrial State, the least delay is in the middle district, 23 months; the most delay is in the eastern district, around Philadelphia, 41 months—probably the longest in the country. And so on as you go down the line.

As you tackle the industrial States, you find that that is where the congestion is the most severe, and that is where your problem is. It is

Mr. JAVITS. Mr. President, I wish to refer to one other matter that is important: Why the role of the Commission? I deeply believe the cease-and-desist power in these particular cases with this kind of case, and considering the condition of our courts, is absolutely essential to the best functioning of the guarantee against discrimination respecting employment.

I point out that there are many very popular agencies, with the backing of the very people who are against this kind of power for the EEOC, which have cease-and-desist powers. The Federal Trade Commission is a striking example. In addition, a number of Government departments have it. We have analyzed all of those.

If this were so iniquitous—what the Senator from Colorado calls vesting the investigative, prosecutorial, and judicial powers in the same agency—look at the situation. Thirty-four States have authority analogous to this authority in their State establishments in which they seek to correct discrimination in employment. I think that is the weight of the evidence.

As to the generic case for administrative agencies and administrative law, I think the courts themselves would be the most violent opponents of any effort to dismantle that machinery. They know it would crush and destroy them. They could not survive with the inundation that would result unless we changed the court system and tripled or quadrupled the number of judges. Unless that were done we would be lost. I do not need to argue that case here and now, but that is the situation we are inviting.

The last point I wish to make is that the three-judge court idea is not new and is not something that the Senator from Colorado is giving us in this amendment. It is in the law now. A three-judge court may be convened at the request of the Attorney General, and that is contained at page 64 of the committee report, setting forth section 707(b) of the statute.

In short, Mr. President, we would be departing from the classic way in which to enforce these rights.

Now that we have filed our amendment the question is: Which of the two methodologies is preferred? We hope there is a way to deal with this crushing burden on the court process. The plan of the Senator from Colorado does not deal with that at all. Perhaps the idea of the Senator from Kentucky would be the right one, but I have no feeling about it. However, the Dominick amendment just throws the cases into the courts, and there are bound to be many cases. The backlog amendment works against the Dominick amendment rather than for it. It would throw the cases into the courts, to sink or swim, with tremendous congestion on the court calendars. If our amendment is imperfect we can change it, but we tried to provide a time relation through time intervals in the law of 1 or 6 months.

The time intervals defined in the Dominick amendment refers to the earliest practical date. Based on the tremendous congestion in the courts, that would be 10 months, even by his amendment, against 6 months, which is the maximum bracket of the Commission.

Mr. President, for all those reasons I adhere to my original view. I am sorry my beloved friend does not agree with me but we agree so often there would be something wrong with one of us if we did not

If no Senator yields time, it will be charged equally to both sides.

Mr. JAVITS. Mr. President, I ask unanimous consent that we may have a quorum call, with the time charged equally to both sides.

The PRESIDING OFFICER. Is there objection? The Chair hears none, and it is so ordered.

Mr. JAVITS. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. DOMINICK. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. DOMINICK. Mr. President, how much time do I have remaining?

The PRESIDING OFFICER. The Senator has 3 minutes remaining.

Mr. DOMINICK. I yield myself those 3 minutes.

Mr. President, during the process of this debate, reference has been made to the comparable cease-and-desist powers that are in the NLRB. The other executive agencies are largely, I would say, regulatory agencies, as opposed to the EEOC or the NLRB.

I think it is a matter of interest that before the Special Subcommittee on Labor in the other body hearings were held on proposals to expedite the NLRB processes. Those hearings, it should be noted, brought out the point that it could take 2½ years from the time a worker walks into a regional NLRB office with a charge until the time a court of appeals finally issues an order that he be reinstated with or without back pay. So it seems perfectly apparent that even in an agency that has been established that long, which has hearing examiners, an independent General Counsel, special expertise and all its precedents, it still takes 2½ years.

I do not think that this would be true under job discrimination with the adoption of my amendment, because once the trial is over, the court at that point is free to issue injunctive relief and to issue such other remedies as it may deem appropriate, or even, to dismiss the case, if it determines that the evidence has not supported the complainant.

In summary what we are doing, is asking for enforcement for the EEOC through the court system, through an expedited three-judge court where the case is of general public interest, so that there can be expedited proceedings with appeal directly to the Supreme Court. Where the case is not of general public interest will be brought into district court for expedited hearings, and once the decision has been made, the judge who has jurisdiction can issue whatever remedy seems suitable in view of the facts before him.

It avoids the conglomeration of powers in one executive agency of the prosecution, the investigation, the judicial hearing, and the enforcement proceeding—all of which put into one body are wrong, be it the EEOC or the NLRB.

So I urge the adoption of my amendment.

CIVIL RIGHTS AND THE NEED FOR ENFORCEMENT OF FAIR EMPLOYMENT PRACTICES

Mr. MOSS. Mr. President, the struggle to expand equality in America has had a long journey. The path is marked by periodic accomplishments that have advanced rights that should have been

The VICE PRESIDENT. All time on the amendment has expired.

Under the previous order, the question is on agreeing to the amendment of the Senator from Colorado to the amendment of the Senator from New York and the Senator from New Jersey. On this question the yeas and nays have been ordered.

Mr. BYRD of West Virginia. Mr. President, I suggest the absence of a quorum.

The VICE PRESIDENT. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The VICE PRESIDENT. Without objection, it is so ordered.

The question is on agreeing to the amendment of the Senator from Colorado (Mr. Dominick) (No. 884) to the amendment of the Senator from New York (Mr. Javits) and the Senator from New Jersey (Mr. Williams).

On this question the yeas and nays have been ordered and the clerk will call the roll.

The legislative clerk called the roll.

Mr. TAFT (when his name was called). On this vote I have a pair with the distinguished Senator from Wyoming (Mr. Hansen). If he were present and voting, he would vote "yea;" if I were at liberty to vote, I would vote "nay." I withhold my vote.

Mr. FULBRIGHT (after having voted in the affirmative). On this vote I have a pair with the distinguished Senator from Maine (Mr. Muskie). If he were present and voting, he would vote "nay;" if I were at liberty to vote, I would vote "yea." I withdraw my vote.

Mr. MANSFIELD (after having voted in the negative). On this vote I have a pair with the distinguished Senator from Georgia (Mr. Talmadge). If he were present and voting, he would vote "yea;" if I were at liberty to vote, I would vote "nay." I withdraw my vote.

Mr. BYRD of West Virginia. I announce that the Senator from New Mexico (Mr. Anderson), the Senator from Indiana (Mr. Hartke), the Senator from Minnesota (Mr. Humphrey), the Senator from Washington (Mr. Jackson), the Senator from Washington (Mr. Magnuson), and the Senator from Maine (Mr. Muskie) are necessarily absent.

I further announce that the Senator from Georgia (Mr. Talmadge) and the Senator from Massachusetts (Mr. Kennedy) are absent on official business.

I further announce that, if present and voting, the Senator from Minnesota (Mr. Humphrey), the Senator from Washington (Mr. Jackson), and the Senator from Washington (Mr. Magnuson) would each vote "yea."

Mr. GRIFFIN. I announce that the Senator from Hawaii (Mr. Fong), the Senator from Wyoming (Mr. Hansen), and the Senators from Oregon (Mr. Hatfield and Mr. Packwood) are necessarily absent.

The Senator from South Dakota (Mr. Mundt) is absent because of illness.

If present and voting, the Senator from Hawaii (Mr. Fong) and the Senator from Oregon(Mr. Hatfield) would each vote "nay."

The pair of the Senator from Wyoming (Mr. Hansen) has been previously announced.

The result was announced—yeas 45, nays 39, as follows:

[No. 45 Leg.]

YEAS—45

Aiken	Cooper	Jordan, N.C.
Allen	Cotton	Jordan, Idaho
Allott	Curtis	Long
Baker	Dole	McClellan
Bellmon	Dominick	Miller
Bennett	Eastland	Roth
Bentsen	Ellender	Saxbe
Bible	Ervin	Smith
Brock	Fannin	Sparkman
Buckley	Gambrell	Spong
Byrd, Va.	Goldwater	Stennis
Byrd, W. Va.	Griffin	Thurmond
Cannon	Gurney	Tower
Chiles	Hollings	Weicker
Cook	Hruska	Young

NAYS—39

Bayh	Inouye	Pell
Beall	Javits	Percy
Boggs	Mathias	Proxmire
Brooke	McGee	Randolph
Burdick	McGovern	Ribicoff
Case	McIntyre	Schweiker
Church	Metcalf	Scott
Cranston	Mondale	Stafford
Eagleton	Montoya	Stevens
Gravel	Moss	Symington
Harris	Nelson	Tunney
Hart	Pastore	Williams
Hughes	Pearson	

PRESENT AND GIVING LIVE PAIRS, AS PREVIOUSLY RECORDED—3

Fulbright, for.
Mansfield, against.
Taft, against.

NOT VOTING—13

Anderson	Humphrey	Muskie
Fong	Jackson	Packwood
Hansen	Kennedy	Talmadge
Hartke	Magnuson	
Hatfield	Mundt	

So Mr. Dominick's amendment (No. 884) to the amendment of the Senator from New York (Mr. Javits) and the Senator from New Jersey (Mr. Williams) was agreed to.

Mr. MILLER. Mr. President, I move to reconsider the vote by which the amendment was agreed to.

Mr. DOMINICK. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

PROGRAM

Mr. MANSFIELD. Mr. President, at this time I would like to ask the distinguished Senator from Louisiana a question. Would it be possible to take up the debt ceiling measure which I understand needs consideration immediately, even if it meant delaying the reporting of H.R. 1 by 1, 2, or 3 days?

Mr. LONG. The committee has scheduled hearings on H.R. 1. We have scheduled hearings for the day after tomorrow, which is Thurs-

circumstances I could not give it any consideration, because we have gone this far. We ought to try at least once more. Then after that it will be up to the joint leadership to decide what should or should not be done about the pending legislation. But I hope this time cloture will prevail, and I hope to be one of the signers of the cloture motion.

Mr. RANDOLPH. Mr. President, if the Senator will yield, as long as we are talking about future dates, can the majority leader tell us if there is to be any business from the standpoint of possible votes in the Senate on the observance of Washington's birthday next Monday?

Mr. MANSFIELD. The answer is "Yes."

Mr. President, the Senator from Colorado has the floor.

Mr. COTTON. Mr. President, if the Senator will yield. I am thoroughly aware of the fact that we cannot please every Senator, but would 10 o'clock be as good for Wednesday?

Mr. MANSFIELD. Ten o'clock would be agreeable, if a motion is laid before the Senate.

Now I think I ought to yield to the Senator from New York, who has an amendment.

The PRESIDING OFFICER. The question recurs on amendment No. 878, as amended.

Mr. JAVITS. Mr. President, a parliamentary inquiry.

The PRESIDING OFFICER. The Senator will state it.

Mr. JAVITS. Is the Williams-Javits amendment now any further amendable?

The PRESIDING OFFICER. No.

Mr. JAVITS. And the text of it now is what was the Dominick amendment?

The PRESIDING OFFICER. That is correct.

Mr. JAVITS. Mr. President, have the yeas and nays been ordered?

The PRESIDING OFFICER. Not yet.

Mr. JAVITS. I see no necessity for them. I hope we will have a voice vote.

Mr. ERVIN. Mr. President, I ask for the yeas and nays.

The yeas and nays were ordered.

The PRESIDING OFFICER. The question is on agreeing to the Williams-Javits amendment, as amended. On this question the yeas and nays have been ordered, and the clerk will call the roll.

The legislative clerk called the roll.

Mr. BYRD of West Virginia. I announce that the Senator from New Mexico (Mr. Anderson), the Senator from Oklahoma (Mr. Harris), the Senator from Indiana (Mr. Hartke), the Senator from Minnesota (Mr. Humphrey), the Senator from Washington (Mr. Jackson), the Senator from Washington (Mr. Magnuson), the Senator from South Dakota (Mr. McGovern), the Senator from Maine (Mr. Muskie), and the Senator from Alaska (Mr. Gravel) are necessarily absent.

I further announce that the Senator from Georgia (Mr. Talmadge) and the Senator from Massachusetts (Mr. Kennedy) are absent on official business.

I further announce that, if present and voting, the Senator from Washington (Mr. Magnuson), the Senator from Washington (Mr. Jackson), and the Senator from Minnesota (Mr. Humphrey) would each vote "yea."

Mr. GRIFFIN. I announce that the Senator from Hawaii (Mr. Fong), the Senator from Wyoming (Mr. Hansen), and the Senators from Oregon (Mr. Hatfield and Mr. Packwood) are necessarily absent.

The Senator from South Dakota (Mr. Mundt) is absent because of illness.

If present and voting, the Senator from Wyoming (Mr. Hansen) would vote "yea."

The result was announced—yeas 81, nays 3, as follows:

[No. 46 Leg.]

YEAS—81

Aiken	Dominick	Nelson
Allen	Eagleton	Pastore
Allott	Eastland	Pearson
Baker	Ellender	Pell
Bayh	Ervin	Percy
Beall	Fannin	Proxmire
Bellmon	Fulbright	Randolph
Bennett	Gambrell	Ribicoff
Bentsen	Goldwater	Roth
Bible	Griffin	Saxbe
Boggs	Gurney	Schweiker
Brock	Hollings	Scott
Brooke	Hruska	Smith
Buckley	Hughes	Sparkman
Burdick	Javits	Spong
Byrd, Va.	Jordan, N.C.	Stafford
Byrd, W. Va.	Jordan, Idaho	Stennis
Cannon	Long	Stevens
Case	Mansfield	Stevenson
Chiles	Mathias	Symington
Church	McClellan	Taft
Cook	McGee	Thurmond
Cooper	McIntyre	Tower
Cotton	Miller	Tunney
Cranston	Mondale	Weicker
Curtis	Montoya	Williams
Dole	Moss	Young

NAYS—3

Hart	Inouye	Metcalf

NOT VOTING—16

Anderson	Hatfield	Mundt
Fong	Humphrey	Muskie
Gravel	Jackson	Packwood
Hansen	Kennedy	Talmadge
Harris	Magnuson	
Hartke	McGovern	

So the Williams-Javits amendment (No. 878), as amended, was agreed to.

Mr. WILLIAMS. Mr. President, I move to reconsider the vote by which the amendment was agreed to.

Mr. JAVITS. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. HRUSKA. Mr. President, I call up my amendment No. 834—

Mr. DOMINICK. Mr. President, will the Senator from Nebraska yield? I have some technical amendments which really do nothing

PRESENT AND GIVING A LIVE PAIR, AS PREVIOUSLY RECORDED—1

Mansfield, against.

NOT VOTING—23

Anderson	Gravel	Mondale
Brock	Hansen	Moss
Buckley	Hartke	Mundt
Chiles	Hughes	Muskie
Cooper	Humphrey	Stevens
Fannin	Jackson	Taft
Fong	Kennedy	Talmadge
Fulbright	McGovern	

So Mr. Hruska's amendment (No. 834) was rejected.

Mr. WILLIAMS. Mr. President, I move to reconsider the vote by which the amendment was rejected.

Mr. JAVITS. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

The PRESIDING OFFICER. The Senate will be in order.

Mr. SCOTT. Mr. President, may I inquire as to whether we are under controlled time?

The PRESIDING OFFICER. We are not under controlled time.

Mr. SCOTT. Then I ask unanimous consent to proceed for 3 minutes on another matter.

The PRESIDING OFFICER. Without objection, it is so ordered.

* * * * * * *

The Senate continued with the consideration of the bill (S. 2515) a bill to further promote equal employment opportunities for American workers.

Mr. HOLLINGS. Mr. President, I wish to address some remarks to the equal employment opportunities bill. Yesterday, by a vote of 45 to 39, the Senate accepted the Dominick amendment to the equal employment opportunities bill. As a sponsor of the original Dominick amendment, as well as the one that was adopted, I can attest to the fact that this acceptance has not been easy.

On January 24 and again on January 26, a similar amendment was defeated by a narrow 2-vote margin. However, by now accepting this amendment and denying cease-and-desist power to the Equal Employment Opportunity Commission, we have guaranteed that the Commission will not be a special interest group arrogating to itself the roles of indicator, prosecutor, judge and jury.

Rather, we have assured that the Commission will be able to turn to the Federal court for review of its actions. By prevailing for a judicial procedure, we have assured to the employer that he will not be unconscionably harassed.

Most importantly, we have guaranteed to minorities an effective means of achieving equal job opportunities. And this equal opportunity is, after all, what must be accomplished.

Mr. President, I ask unanimous consent to have printed in the Record a letter from the Honorable Arthur M. Williams, Jr., president of the South Carolina Electric and Gas Co. and a company policy memorandum.

There being no objection, the material was ordered to be printed in the Record, as follows:

74-699 O - 72 - 102

SECTION 14

This section provides that no government contract, or portion thereof, can be denied, withheld, terminated, or superseded by a government agency under the Executive Order 11246 or any other order of law without according the respective employer a full hearing and adjudication pursuant to 5 U.S.C. § 554 et seq. where such employer has an affirmative action program for the same facility which had been accepted by the Government within the prior twelve months. Such plan shall be deemed to be accepted by the Government if the appropriate compliance agency has accepted such plan and the Office of Federal Contract Compliance has not disapproved of such plan within 40 days. However, an employer who substantially deviates from the previously accepted plan is excluded from the protection afforded by this section.

The PRESIDING OFFICER. The question now is on agreeing to the committee amendment in the nature of a substitute, as amended.

The committee substitute, as amended, was agreed to.

The PRESIDING OFFICER. The question now is on the engrossment and third reading of the bill.

The bill was ordered to be engrossed for a third reading, and was read the third time.

The PRESIDING OFFICER. The bill having been read the third time, the question is, shall it pass?

Mr. MANSFIELD. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

The question is on final passage of S. 2515. On this question the yeas and nays have been ordered, and the clerk will call the roll.

The legislative clerk called the roll.

Mr. BYRD of West Virginia. I announce that the Senator from Indiana (Mr. Bayh), the Senator from Indiana (Mr. Hartke), the Senator from Washington (Mr. Jackson), the Senator from Arkansas (Mr. McClellan), the Senator from South Dakota (Mr. McGovern), the Senator from Maine (Mr. Muskie), and the Senator from Arkansas (Mr. Fulbright) are necessarily absent.

I further announce that, if present and voting, the Senator from Arkansas (Mr. Fulbright), the Senator from Washington (Mr. Jackson), the Senator from South Dakota (Mr. McGovern), and the Senator from Maine (Mr. Muskie) would each vote "yea."

Mr. GRIFFIN. I announce that the Senator from Tennessee (Mr. Baker) is absent by leave of the Senate on official committee business.

The Senator from Wyoming (Mr. Hansen) and the Senator from Iowa (Mr. Miller) are necessarily absent.

The Senator from South Dakota (Mr. Mundt) is absent because of illness.

The result was announced—yeas 73, nays 16, as follows:

[No. 56 Leg.]

YEAS—73

Aiken	Fong	Nelson
Allott	Gambrell	Packwood
Anderson	Gravel	Pastore
Beall	Griffin	Pearson
Bellmon	Gurney	Pell
Bennett	Harris	Percy
Bentsen	Hart	Proxmire
Bible	Hatfield	Randolph
Boggs	Hollings	Ribicoff
Brooke	Hruska	Roth
Buckley	Hughes	Saxbe
Burdick	Humphrey	Schweiker
Byrd, W. Va.	Inouye	Scott
Cannon	Javits	Smith
Case	Jordan, Idaho	Spong
Chiles	Kennedy	Stafford
Church	Magnuson	Stevens
Cook	Mansfield	Stevenson
Cooper	Mathias	Symington
Cotton	McGee	Taft
Cranston	McIntyre	Tunney
Curtis	Metcalf	Weicker
Dole	Mondale	Williams
Dominick	Montoya	
Eagleton	Moss	

NAYS—16

Allen	Fannin	Talmadge
Brock	Goldwater	Thurmond
Byrd, Va.	Jordan, N.C.	Tower
Eastland	Long	Young
Ellender	Sparkman	
Ervin	Stennis	

NOT VOTING—11

Baker	Hartke	Miller
Bayh	Jackson	Mundt
Fulbright	McClellan	Muskie
Hansen	McGovern	

So the bill (S. 2515) was passed, as follows:

S. 2515

An act to further promote equal employment opportunities for American workers

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Equal Employment Opportunities Enforcement Act of 1972".

SEC. 2. Section 701 of the Civil Rights Act of 1961 (78 Stat. 253; 42 U.S.C. 2000e) is amended as follows:

(1) In subsection (a) insert "governments, governmental agencies, political subdivisions," after the word "individuals".

(2) Subsection (b) is amended to read as follows:

92D CONGRESS } SENATE { REPORT
2d Session } { No. 92-681

EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972

MARCH 2, 1972.—Ordered to be printed

Mr. WILLIAMS, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany H.R. 1746]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 1746) An Act to further promote equal employment opportunities for American workers, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment insert the following:

That this Act may be cited as the "Equal Employment Opportunity Act of 1972".

SEC. 2. Section 701 of the Civil Rights Act of 1964 (78 Stat. 253; 42 U.S.C. 2000e) is amended as follows:

(1) In subsection (a) insert "governments, governmental agencies, political subdivisions," after the word "individuals".

(2) Subsection (b) is amended to read as follows:

"(b) The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5 of the United States Code), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal

the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

"(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

"(f) (1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision,

74-699 O - 72 - 115

No. 76-96

In the Supreme Court of the United States

OCTOBER TERM, 1976

OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

DANIEL M. FRIEDMAN,
Acting Solicitor General,

KEITH A. JONES,
Deputy Solicitor General,

THOMAS S. MARTIN,
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ABNER W. SIBAL,
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INDEX

CITATIONS

Cases—Continued Page

Cases—Continued Page

Cases—Continued — Page

Statutes and regulation:

Statutes and regulation—Continued — Page

Miscellaneous:

In the Supreme Court of the United States

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OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (A. 25-43) is reported at 535 F. 2d 533. The district court's opinion (A. 19-24) is not officially reported but is unofficially reported at 12 FEP Cases 1298.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 1976. The petition for a writ of certiorari was filed on July 23, 1976, and was granted on

December 13, 1976. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Title VII of the Civil Rights Act of 1964 permits the Equal Employment Opportunity Commission to bring an enforcement action more than 180 days after the filing of the underlying charge of employment discrimination.

2. Whether an enforcement action brought by the Commission is subject to state statutes of limitations.

STATUTORY PROVISION INVOLVED

Section 706(f)(1) of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. (Supp. V.) 2000e-5(f)(1), provides in pertinent part:

> If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge * * *. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section * * * or

> the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission * * * shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved * * *.

STATEMENT

In February 1974, the United States Equal Employment Opportunity Commission, pursuant to its enforcement powers under Section 706(f)(1) of the Civil Rights Act of 1964, as amended, 42 U.S.C. (Supp. V) 2000e-5(f)(1), filed suit against petitioner, charging unlawful sex discrimination in various employment practices (A. 9-12). The Commission sought both an injunction against sexually discriminatory employment practices and back pay for persons who had been adversely affected by such practices (A. 12).

The Commission's suit was based on a charge Tamar Edelson had filed with its San Francisco, California, District Office on March 9, 1971 (A. 5-6).[1] At the time the charge was filed, the San Francisco Office had eight investigators on its staff and approximately 1000 charges pending before it (A.

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[1] The charge was first lodged with the Commission in December 1970 (A. 3). It was then referred to the appropriate state agency for consideration. It was subsequently referred back to the Commission and formally filed at that time. See *Love* v. *Pullman Co.*, 404 U.S. 522.

6).[2] Investigation of the charge was commenced by service of the charge on petitioner on August 16, 1971 (*ibid.*). The Commission served proposed findings of fact on petitioner on February 25, 1972, and petitioner filed exceptions to them on March 23, 1972 (*ibid.*).

On July 13, 1972, the Commission invited petitioner to participate in conciliation discussions; petitioner entered into such discussions, and the Commission stayed its ruling pending their outcome (*ibid.*). On October 20, 1972, these initial conciliation efforts were deemed unsuccessful, and on February 2, 1973, the Commission determined that there was reasonable cause to believe complainant Edelson's charge (*ibid.*).

On February 26, 1973, and March 20, 1973, petitioner requested further conciliation discussions (A. 7). Such discussions continued until July 9, 1973 (*ibid.*). On September 13, 1973, the Commission determined that the further conciliation efforts had failed, and it so notified petitioner (*ibid.*). At this time, complainant Edelson requested that the case be referred to the Commission's General Counsel to bring an enforcement action (*ibid.*).[3]

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[2] The facts recited are taken from an affidavit by the Commission submitted in the district court, which the court necessarily accepted in ruling on petitioner's motion for summary judgment (see A. 19).

[3] It appears that complainant Edelson was never formally notified of her right to bring suit herself (A. 7).

On February 22, 1974, the Commission filed an enforcement action in the United States District Court for the Central District of California (A. 9). The district court dismissed the complaint on the ground that Section 706(f)(1) requires that any enforcement action be brought within 180 days of the filing of the charge with the Commission (A. 21). Alternatively, the court held that the Commission's enforcement action was subject to state statutes of limitations and consequently was barred by the one-year limitation period of the California Code of Civil Procedure § 340(3) (West 1954) (A. 21-22).

The court of appeals reversed, holding both that the Commission's power to bring suit does not lapse upon the expiration of 180 days from the filing of a charge (A. 27-28) and that the Commission's enforcement actions are not subject to state statutes of limitations (A. 29-38).

SUMMARY OF ARGUMENT

I

In 1972, Congress amended Section 706(f) of the Civil Rights Act of 1964 to grant the Equal Employment Opportunity Commission statutory authority to bring civil actions to enforce private rights against unlawful employment discrimination. See *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44. In amending the Act, Congress preserved the existing private right of action by providing that "if within one hundred and eighty days from the filing

of [the] charge of [employment discrimination] * * * the Commission has not filed a civil action under this section * * *, a civil action may be brought against the respondent named in the charge * * * by the person claiming to be aggrieved * * *." Section 706(f)(1) of the Act. Petitioner's principal argument is that this provision imposes a limitation on the Commission's right to bring an enforcement action.

A. By its terms, the statute imposes no period of limitation on the Commission's right to sue. The only conditions placed upon the Commission's enforcement actions are preconditions: more than 30 days must have passed after the charge was filed, and the Commission must have been unable to obtain an acceptable conciliation agreement. "The statute contains no other restrictions, either express or implied." *Equal Employment Opportunity Commission* v. *Duval Corp.*, 528 F. 2d 945, 947 (C.A. 10).

The 180-day provision upon which petitioner relies is merely a temporary bar to institution of a private action; it places no limitation or prohibition on the later institution of enforcement actions by the Commission. Indeed, Congress rejected a proposal that would have terminated the Commission's authority to act with respect to a charge after the expiration of the 180-day period. S. 2515, 92d Cong., 1st Sess. (1971). When Congress has established time constraints in Title VII, it has done so in clear, precise, and unambiguous language. "The very absence of an explicit Commission limitation, in the face of an express private limitation, strongly suggests that Congress did not intend that EEOC actions be governed by the limitation period." *Equal Employment Opportunity Commission* v. *E.I. duPont de Nemours and Co.*, 516 F. 2d 1297, 1300 (C.A. 3).

B. A period of limitation should not be inferred if it is not explicit, for such a limitation would be in conflict with the overriding legislative concern for vindication of private rights against employment discrimination. Congress intended aggrieved individuals to be able to elect between private litigation and Commission enforcement actions. A 180-day limitation on actions brought by the Commission would deprive such individuals of that choice and would terminate the Commission's enforcement authority for failure to meet a timetable that Congress knew to be incompatible with the Commission's workload and limited resources. See H.R. Rep. No. 92-238, 92d Cong., 1st Sess., p. 12 (1971).

Because of the heavy volume of charges and the time required for conciliation, the Commission often is unable to complete conciliation within 180 days. If the sanction of litigation is terminated after 180 days, the Commission's ability to conduct effective conciliation would be largely nullified.

Moreover, if the Commission is barred from bringing suit after 180 days, thousands of complainants would be forced to bring suit themselves in order to vindicate their rights under the Act. It was to avoid this result that Congress granted the Commission litigation enforcement powers in the first place, for

many complainants are poor and unable to afford legal representation.

II

Enforcement actions brought by the Commission are not subject to state statutes of limitations. Where the federal government exercises the right to sue under a federal statute, such suits are subject to state statutes of limitations only where the clear congressional intent requires that result. *United States* v. *Nashville, Chattanooga & St. Louis Railway Co.*, 118 U.S. 120, 125. Since neither the terms of Title VII nor its legislative history indicate an intent that state statutes of limitations govern Commission enforcement efforts, this action is not subject to state-imposed time limitations.

The application of state statutes of limitations would jeopardize efforts at conciliation, encourage premature litigation, and thwart the underlying statutory purpose of eradicating discrimination in employment. Applicability of a statue of limitation could lead recalcitrant employers to prolong conciliation past the point at which either the Commission or complainants could bring suit. To protect themselves, complainants would be forced to bring suits prematurely, while potentially fruitful conciliation efforts continued. In many cases, their inability to maintain a lawsuit would frustrate vindication of their statutory rights.

The public interest character of the Commission's enforcement actions precludes application of state statutes of limitations. Cf. *United States* v. *Summerlin*, 310 U.S. 414; *Trbovich* v. *United Mine Workers*, 404 U.S. 528. A suit to enforce Title VII rights involves " 'the vindication of a major public interest.' " *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 778 n. 40. Title VII back pay awards are an integral part of the statutory relief scheme and also partake of this public character. See *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-419. Therefore, whether the relief sought is back pay or an injunction, when the Commission sues to enforce Title VII it is acting as the sovereign in attempting to promote the public interest and is immune from state limitations periods.

ARGUMENT

I

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 PERMITS THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION TO BRING AN ENFORCEMENT ACTION MORE THAN 180 DAYS AFTER THE FILING OF THE UNDERLYING CHARGE OF EMPLOYMENT DISCRIMINATION

The purpose and history of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. 2000e *et seq.*, were concisely summarized by this Court in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44:

> Congress enacted Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or

national origin. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 800 (1973); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429-430 (1971). Cooperation and voluntary compliance were selected as the preferred means for achieving this goal. To this end, Congress created the Equal Employment Opportunity Commission and established a procedure whereby existing state and local equal employment opportunity agencies, as well as the Commission, would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit. In the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103, Congress amended Title VII to provide the Commission with further authority to investigate individual charges of discrimination, to promote voluntary compliance with the requirements of Title VII, and to institute civil actions against employers or unions named in a discrimination charge.

The 1972 amendment to which the Court referred, granting the Commission statutory authority to bring enforcement actions in federal district courts, is now incorporated in Section 706(f)(1) of the Act, 42 U.S.C. (Supp. V) 2000e-5(f)(1). Prior to the amendment, the role of the Commission in eliminating employment discrimination had been limited, as this Court noted, to that of conferee, conciliator, and persuader. If conciliation failed, the party alleging discrimination, but not the Commission, was empowered to bring a civil action to enforce the statutory right against discrimination. See Section 706(e) of

the Act, 42 U.S.C. (1970 ed.) 2000e-5(e). The Commission had no right even to intervene in such actions. *Braddy* v. *Southern Bell Telephone & Telegraph Co.*, 458 F.2d 666 (C.A. 5); *Air Lines Stewards and Stewardesses Assn, Local 550* v. *American Airlines, Inc.*, 455 F. 2d 101 (C.A. 7), certiorari denied, 416 U.S. 993.

In 1972 Congress determined that this exclusive reliance upon conciliation and private litigation had proven unsatisfactory, and it concluded that the Commission had been "ineffective due directly to its inability to enforce its findings." H.R. Rep. No. 92-238, 92d Cong., 1st Sess., p. 5 (1971) (Legislative History at 65).[4] Accordingly, Section 706 was amended to authorize the Commission to institute civil litigation on behalf of individuals charging unlawful employment discrimination. But Congress intended that this power would be exercised only as a last resort: "[o]nly if conciliation proves to be impossible do we expect the Commission to bring action in Federal district court to seek enforcement." 118 Cong. Rec. 7563 (1972) (Legislative History at 1856). Thus the 1972 amendment enlarged the Commission's powers without lessening its responsibility to investigate individual complaints and to attempt to resolve such complaints through conciliation.

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[4] "Legislative History" refers to the Legislative History of the Equal Employment Opportunity Act of 1972, prepared by the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess. (Committee Print, 1972).

The various responsibilities of the Commission are made explicit in Section 706. The Commission is required to investigate all charges of employment discrimination, and "if the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such unlawful employment practice by informal methods of conference, conciliation and persuasion." Section 706(b). "If * * * the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action * * *." Section 706(f)(1).

Having armed the Commission with this twin mandate to conciliate where possible and litigate where necessary, Congress "hoped that recourse to the private lawsuit will be the exception and not the rule, and that the vast majority of complaints will be handled through the offices of the EEOC or the Attorney General as appropriate." 118 Cong. Rec. 7168 (1972) (Legislative History at 1847). Congress preserved the private right of action, however, by providing that "if within one hundred and eighty days from the filing of [the] charge [of employment discrimination] * * * the Commission has not filed a civil action under this section * * *, a civil action may be brought against the respondent named in the charge * * * by the person claiming to be aggrieved * * *." Section 706(f)(1).

Petitioner's principal argument (Br. 18-34) is that this statutory language imposes a limitation on the Commission's right to bring its own enforcement action: petitioner asserts that the Commission must bring its action within 180 days or not at all. Every court of appeals that has addressed this issue has held to the contrary.[8] As we now show, neither the language of the statute nor its evident purposes are consistent with so stringent a limitation as petitioner would have this Court impose on the Commission's ability to provide effective enforcement of Title VII.

A. By Its Terms, The Statute Imposes No Period Of Limitation On The Commission's Enforcement Actions

Section 706(f)(1) of the Act contains two directives, one addressed to civil actions brought by the aggrieved party and the other to actions brought by the Commission. The statute first addresses the power of the Commission to sue:

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[8] *Equal Employment Opportunity Commission* v. *E. I. du-Pont de Nemours and Co.*, 516 F.2d 1297 (C.A. 3); *Equal Employment Opportunity Commission* v. *Cleveland Mills Co.*, 502 F.2d 153 (C.A. 4), certiorari denied, 420 U.S. 946; *Equal Employment Opportunity Commission* v. *Louisville & Nashville R. Co.*, 505 F.2d 610 (C.A. 5), certiorari denied, 423 U.S. 824; *Equal Employment Opportunity Commission* v. *Kimberly-Clark Corp.*, 511 F.2d 1352 (C.A. 6), certiorari denied, 423 U.S. 994; *Equal Employment Opportunity Commission* v. *Meyer Brothers Drug Co.*, 521 F.2d 1364 (C.A. 8); *Equal Employment Opportunity Commission* v. *Duval Corp.*, 528 F.2d 945 (C.A. 10).

> "If within thirty days after a charge is filed with the Commission * * * the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency or political subdivision named in the charge."

This language, read in isolation, might suggest that the Commission may bring suit at any time after the expiration of 30 days after the filing of the charge, *i.e.*, that the only statutory condition placed upon the Commission's right to sue is that 30 days pass without a conciliation agreement being entered into. But the lower federal courts uniformly have concluded that the Commission's right to sue under Section 706(f)(1) must be considered in light of the Commission's affirmative obligation, under Section 706(b), to serve notice of the charge, to investigate to determine whether there is reasonable cause to believe the charge is true, and to attempt to eliminate alleged unlawful employment practices by informal methods of conference, conciliation, and persuasion. " 'The Commission's power of suit and administrative process [are not] unrelated activities, [but] sequential steps in a unified scheme for securing compliance with Title VII.' " *Equal Employment Opportunity Commission* v. *Hickey-Mitchell Co.*, 507 F. 2d 944, 948 (C.A. 8). These courts therefore have held that a suit brought by the Commission before discharging its responsibility to investigate and attempt conciliation is premature. See, *e.g.*, *Patterson* v. *American Tobacco Co.*, 535 F. 2d 257, 272 (C.A. 4); *United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F. 2d 826, 869 (C.A. 5); *Equal Employment Opportunity Commission* v. *Container Corp. of America*, 352 F. Supp 262, 265 (M.D. Fla.).

Thus Section 706(f)(1) has been read as imposing two independent conditions on the Commission's authority to initiate litigation: (1) that more than 30 days must have elapsed from the filing of the charge underlying the suit[6] and (2) that the Commission has been unable to obtain an acceptable conciliation agreement from the respondent. No other conditions or limitations are placed on the Commission's power to sue. "The statute contains no other restrictions, either express or implied." *Equal Employment Opportunity Commission* v. *Duval Corp.*, 528 F. 2d 945, 947 (C.A. 10).

Section 706(f)(1) further establishes a qualified private right of action:

> If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), which ever is later, the Commission has not filed a civil action under this section * * * or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission * * * shall so notify

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[6] Even during that initial period the Commission may seek temporary relief. See Section 706(f)(2) of the Act.

> the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge * * * by the person claiming to be aggrieved * * *.

Private actions thus can be brought either when the Commission has dismissed the charge or when the Commission has failed to act within 180 days after the filing of the charge. The statute "serves its apparent purpose when it limits the time before which a private action may not be filed and thus avoids potential interference with the Commission in the performance of its primary duties of conciliation and enforcement." *Equal Employment Opportunity Commission* v. *Cleveland Mills Co.*, 502 F. 2d 153, 156 (C.A. 4), certiorari denied, 400 U.S. 946. Thus the 180-day provision is merely a temporary bar to institution of a private action, imposed for the purpose of affording a period of time within which investigation and conciliation may take place in a relatively nonadversarial setting. By its terms, that provision does not place any limitation or prohibition on the institution of an enforcement action by the Commission at some later date.

The predecessor of Section 706(f), Section 706(e) of the 1964 Act, also postponed the complainant's right to bring suit so that the Commission would have some time to attempt to obtain voluntary compliance before the matter was laid before a court. Under former Section 706(e), the complainant was required to wait only 30 days after filing charges before bringing suit. That 30-day period was never

viewed as the full measure of the Commission's authority to attempt conciliation. To the contrary, it was recognized that the statute anticipated continuing conciliation efforts by the Commission beyond the 30-day period. See 29 C.F.R. 1601.25a (1968), 31 Fed. Reg. 14255. See also *Cunningham* v. *Litton Industries*, 413 F. 2d 887 (C.A. 9); *Bayport Fabricating, Inc.* v. *Equal Employment Opportunity Commission*, 3 FEP Cases 520, 521 (S.D. Tex.). By the same token, the extension of that period to 180 days cannot be read as placing a limitation on the Commission's ability to exercise its statutory powers, which now include the authority to bring civil enforcement actions.

Indeed, Congress explicitly rejected a proposal that would have imposed such a limitation. While Congress was considering amendments to the Act in 1972, it had before it a proposal to give the Commission power to issue cease-and-desist orders. Part of the proposal would have terminated the Commission's authority to act with respect to a charge upon the filing of a private action after expiration of the 180-day period. S. 2515, 92d Cong., 1st Sess. (1971). Thus Congress was aware that, in the absence of a specific prohibition, the Commission's power to act continued beyond the 180-day period, and even beyond the initiation of private litigation.

Congress had before it language that would have changed that result, and it declined to adopt that language. Nor did it adopt any equivalent expression of a limitation on the power of the Commission. See

Equal Employment Opportunity Commission v. *E. I. duPont de Nemours and Co., supra,* 516 F. 2d at 1300, n. 13; *Equal Employment Opportunity Commission* v. *Louisville & Nashville R. Co.,* 505 F. 2d 610, 615 (C.A. 5), certiorari denied, 423 U.S. 824.

On those occasions when Congress decided to establish time constraints, it did so in clear, precise, and unambiguous language.[7] As the Court of Appeals for the Third Circuit pointed out in *Equal Employment Opportunity Commission* v. *E. I. duPont de Nemours and Co., supra,* 516 F. 2d at 1300 (footnotes omitted):

> [W]hen Congress sought to impose specific time limitations in other portions of Section 706 it did so clearly: Charges are to be filed within 180 days of the alleged discriminatory occurrence; an employer is to be notified of the charge within 10 days; an investigation is to be completed within 120 days "so far as practicable"; civil actions are to be expedited; a master can be appointed if the case has not been scheduled for trial within 120 days after issue has been joined; and back pay liability is limited to two years prior to the filing of the charge.

[7] Section 706(e) states unequivocally that "[a] charge under this section shall be filed within one hundred and eighty days * * *." Section 706(b) requires that "the Commission shall serve a notice of the charge * * * on such employer * * * within ten days * * *." Equally definite as to the time and against whom it runs is a later part of the same statute providing that "[t]he Commission shall make its determination on reasonable cause as promptly as possible and so far as is practicable, not later than one hundred and twenty days from the filing of the charge * * *." Section 706(f)(2) states that "[i]t shall be the duty of the court * * * to assign cases for hearing at the earliest practicable date * * *." Section 706(f)(5) requires that "[i]f such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master * * *."

Section 706(f)(1) also provides only 90 days after the Commission notifies the complainant of his right to bring suit within which that right may be exercised. No similar limitation is placed upon the Commission's authority to sue. "The very absence of an explicit Commission limitation, in the face of an express private limitation, strongly suggests that Congress did not intend that EEOC actions be governed by the limitation period." *Equal Employment Opportunity Commission* v. *E. I. duPont de Nemours and Co., supra,* 516 F. 2d at 1300. See also *Equal Employment Opportunity Commission* v. *Cleveland Mills Co., supra,* 502 F. 2d at 156; *Equal Employment Opportunity Commission* v. *Louisville & Nashville R. Co., supra,* 505 F. 2d at 613.

Full investigation and efforts at conciliation often may extend beyond 180 days. See S. Rep. No. 92-415, 92d Cong., 1st Sess., pp. 5-6, 87 (1971) (Legislative History at 414-415, 495). The Commission may not bring suit unless it has been unable to secure an acceptable conciliation agreement. Section 706(f)(1); *Patterson* v. *American Tobacco Co., supra.* Thus a 180-day period of limitation would bar

many Commission actions altogether. Moreover, Congress cannot be assumed to have forced the Commission to choose between litigation and conciliation by requiring the Commission to cease conciliation and bring suit within 180 days or forego suit altogether. See *Equal Employment Opportunity Commission* v. *E. I. duPont de Nemours and Co., supra*, 516 F. 2d at 1300. Cf. *E. I. Dupont de Nemours & Co.* v. *Davis*, 264 U.S. 456.

B. The Statutory Purpose Confirms That No Limitation On The Commission's Right To Sue Was Intended

The overriding congressional concern in enacting the 1972 amendments to the Act was "[w]hat procedures will ensure the most effective enforcement of the substantive provisions of Title VII * * *." H.R. Rep. No. 92-238, 92d Cong., 1st Sess., p. 98 (1971) (Legislative History at 118). Petitioner argues (Br. 12-15) that because Congress was concerned with the delays attendant upon the administrative process, it must have intended to bar further enforcement by the government after 180 days. Such an intention would have been at odds with Congress' principal concern in adopting the 1972 amendments.

There is no doubt that Congress was unhappy about administrative delays and hoped that granting the Commission authority to litigate would result in more expeditious action. Petitioner catalogues the remarks of individual congressmen expressing that concern. However, those parts of the floor debate that petitioner cites as suggesting a limitation period

"are highly ambiguous at best." *Equal Employment Opportunity Commission v. Louisville & Nashville R. Co., supra*, 505 F. 2d at 616. The expressions of individual views upon which petitioner relies do not establish that Congress intended that the litigation authority granted to the Commission would terminate 180 days after the filing of the charge.[8] Those statements cannot be substituted for Congress' failure to write a time limitation into the Act.

Nor do such statements constitute the most relevant or authoritative legislative history. "Of more utility, * * * is the studied Section-by-Section Analysis" prepared by Senators Williams and Javits explaining the Act as agreed to by the Joint Conference Committee. *Equal Employment Opportunity Commission* v. *E. I. duPont de Nemours and Co., supra,*

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[8] While Senator Dominick at one point noted that an amendment to reduce the 180-day period to 150 days "reduces the time period within which the Commission may file" (118 Cong. Rec. 2862 (1972) (Legislative History at 1347)), he also referred to the 180-day provision as a "private filing restriction" (118 Cong. Rec. 1069 (1972) (Legislative History at 893)). In a slightly different context, Senator Dominick also observed that "I do not think the Commission should be mandated on what date [it] should bring suit when [it is] trying to work out matters the best [it] can by conciliation." 118 Cong. Rec. 1069 (1972) (Legislative History at 894). Similarly, while Senator Javits termed the 180-day provision as "the allowable time for the Commission to move into a given situation" (118 Cong. Rec. 1800 (1972) (Legislative History of 1578)), at another point he expressed the view that "the Commission should not, in view of its purpose, be under * * * [a] strict timetable * * *." 118 Cong. Rec. 1069 (1972) (Legislative History at 894).

516 F. 2d at 1300. That analysis confirms that the 180-day provision was not intended to cut off the Commission's right to bring a civil action but merely (118 Cong. Rec. 7168 (1972) (Legislative History at 1847)):

> to make sure that the person aggrieved does not have to endure lengthy delays if the Commission or Attorney General does not act with due diligence and speed. Accordingly, the provisions described above allow the person aggrieved to elect to pursue his or her own remedy under this title in the courts where there is agency inaction, dalliance or dismissal of the charge, or unsatisfactory resolution.

Congress contemplated that a private party was to have the option either to sue in his own name or to rely upon the Commission's enforcement efforts. See *Equal Employment Opportunity Commission* v. *Kimberly-Clark Corp.*, 511 F. 2d 1352, 1358-1359 (C.A. 6), certiorari denied, 423 U.S. 994; *Tuft* v. *McDonnell Douglas Corp.*, 517 F. 2d 1301, 1305-1306 (C.A. 8); *Equal Employment Opportunity Commission* v. *E. I. duPont de Nemours and Co.*, *supra*, 516 F. 2d at 1300.[9] But the complainant's right to elect between

[9] Petitioner argues (Br. 29) that the provision of Section 706(f)(1) that permits the Commission to intervene only in those private suits of public importance implies that the Commission cannot itself sue after 180 days. But it implies only that Congress wished to bar duplicative actions involving identical claims and that the Commission lacks power to bring its own enforcement actions only if the complainant chooses "to elect to pursue his or her own remedy."

remedies would be illusory if the Commission's right of action already had been extinguished. If, as the section-by-section analysis indicates, the complainant could "elect to pursue his or her own remedy," the inference is necessary "that the Commission's right to sue continues after the individual's right has matured." *Equal Employment Opportunity Commission* v. *Cleveland Mills Co.*, *supra*, 502 F. 2d at 157.

In placing the conference report before the House, Congressman Perkins emphasized that conciliation was to be the primary method of Title VII enforcement and that recourse to the remedy of litigation would be appropriate only where "conciliation proves to be impossible." 118 Cong. Rec. 7563 (1972) (Legislative History at 1856). Careful consideration and patient study of employment practices and exploration of avenues of agreement take time. *Equal Employment Opportunity Commission* v. *Cleveland Mills Co.*, *supra*, 502 F. 2d at 157. The Sixth Circuit observed in *Equal Employment Opportunity Commission* v. *Kimberly-Clark Corp.*, *supra*, 511 F. 2d at 1357:

> It is precisely in the type of case where the EEOC might ultimately decide to sue—where widespread discrimination of a systematic or subtle nature is involved—that effective conciliation attempts may well require more than six months. In such cases, discussion will be necessary with labor unions and company personnel, expert consultants may be involved, and the charging parties must be kept fully informed of the progress of negotiations.

Congress was well aware that, because of the large number of charges received [10] and the time required for conciliation, the Commission could not process charges within 180 days.[11] See H.R. Rep. No. 92-238, 92d Cong., 1st Sess., pp. 3-5, 12 (1971) (Legislative History at 63-65, 72); S. Rep. No. 92-415, 92d Cong., 1st Sess., pp. 5-6, 87 (1971) (Legislative History at 414-415, 495). In the absence of compelling evidence, Congress cannot be presumed to have enacted a statute of limitation that would terminate the Commission's litigation authority for failure to meet a timetable totally incompatible with the Commission's workload and limited resources.

Congress would not have imposed a limitation period that could have no other result than to nullify the Commission's power to conduct effective conciliation.

[10] At the end of fiscal year 1976, there were nearly 128,000 charges pending with the Commission. BNA Daily Labor Report No. 14 (January 20, 1977).

[11] Petitioner assumes (Br. 30) that delays are the result of failures on the part of the Commission to act expeditiously rather than the volume of claims and the limited Commission resources. The Fifth Circuit reviewed the legislative history and concluded that "we find no significant indication that Congress attributed the backlog to inefficiency." *Equal Employment Opportunity Commission* v. *Louisville & Nashville R. Co., supra*, 505 F.2d at 617. Indeed, in many cases delay is occasioned by employers who, like petitioner (A. 7), request prolongation of conciliation efforts beyond the point at which the Commission has determined initial efforts to have been unsuccessful.

tion.[12] A respondent who prolongs conciliation efforts by pretending to bargain in good faith could easily extend the administrative process beyond 180 days. See *Equal Employment Opportunity Commission* v. *E. I. duPont de Nemours and Co., supra*, 516 F. 2d at 1300. Under petitioner's argument here, the Commission would thereupon be deprived of the principal sanction with which to back up its further efforts to achieve conciliation.

The Commission could avoid this dilemma only by prematurely laying the matter before a court, thereby terminating potentially fruitful conciliation efforts.[13] But such premature actions cannot be brought under the statutory language permitting suit only "if * * * the Commission has been unable to secure * * * [an acceptable] conciliation agreement." Section 706 (f) (1) of the Act. See *Patterson* v. *American Tobacco*

[12] As the court noted in *Equal Employment Opportunity Commission* v. *Bartenders Int'l Union, Local 41*, 369 F. Supp. 827, 831 (N.D. Cal.):

> Mindful of two and three year delays, this court cannot accept defendant's contention that when Congress gave the Commission the right to sue with one hand, it took it away with the other by requiring that the suit be commenced within a time constraint which it knew the Commission could not meet.

[13] Section 706(f) (1) provides that "[u]pon request, the court may, in its discretion stay further proceedings for not more than sixty days pending * * * further efforts of the Commission to obtain voluntary compliance." Although that provision may make it possible for efforts to continue in some cases, the filing of suit itself may affect the conduct of compliance efforts.

Co., supra; Equal Employment Opportunity Commission v. *Hickey-Mitchell Co., supra.* Congress did not intend to require premature actions, a requirement that would weaken the conciliation process, or add unnecessarily to the caseloads of the district courts, or both.

Moreover, if the Commission is barred from bringing suit after 180 days and does not do so before, thousands of complainants would be forced to bring suit themselves in order to vindicate their rights under the Act. Since many complainants are poor and unable to afford legal representation, their inability to bring suit would effectively deprive them of the protection against employment discrimination that Congress meant to confer. It was to avoid precisely this result that Congress granted the Commission litigation enforcement powers in the first place (S. Rep. No. 92-415, 92d Cong., 1st Sess., p. 17 (1971) (Legislative History at 426)):

> Since most title VII complainants are by the very nature of their complaint disadvantaged, the burden of going to court, initiating legal proceedings by retention of private counsel, and the attendant time delays and legal costs involved, have effectively precluded a very large percentage of valid Title VII claims from ever being decided. * * * [T]he public has an overriding interest in protecting the individual from the denial of those rights which Congress has specifically provided.

In short, the 180-day limitation period petitioner would read into the statute would significantly interfere with judicial as well as administrative vindication of Title VII rights. This Court "will not engraft on the statute a requirement which may inhibit the review of claims of employment discrimination in the federal courts." *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798-799.

There is no evidence that Congress considered the public interest in Title VII enforcement by the Commission secondary to the goal of quick administrative action. Instead, the legislative record points to a congressional recognition that while delays in the system were unfortunate and administrative action should be expedited, fulfillment of Title VII goals was the first priority. For example, in emphasizing the promptness with which it hoped the Commission would make its reasonable cause determinations, Congress was careful to avoid placing an absolute time limitation upon the deliberative functions of the Commission with respect to discrimination claims. Section 706(b) provides only that "so far as practicable," the Commission is to "make its determination on reasonable cause * * * not later than one hundred and twenty days from the filing of the charge."

Since Congress carefully avoided placing an absolute time limitation on the first step in the prelitigation process, and imposed no explicit limitation on when further steps were to be taken, there is no reason to infer that Congress intended that the Commission would forfeit its litigation powers altogether if the final steps were not taken within 180 days.

Congress' decision to permit the Commission to bring suit with respect to the thousands of charges pending with the Commission on the effective date of the 1972 amendments (Pub. L. 92-261, Section 14, 86 Stat. 113) also indicates that Congress' principal concern was with the widest possible Commission enforcement rather than with the imposition of a limitation period. See *Equal Employment Opportunity Commission* v. *E. I. duPont de Nemours and Co., supra; Equal Employment Opportunity Commission* v. *Kimberly-Clark Corp., supra.* Congress was well aware of the limited extent of the Commission's resources but acted to permit Commission suits on pending claims, even though most of those cases could not have been brought within 180 days of the original filings of the charges. *Equal Employment Opportunity Commission* v. *Louisville & Nashville R. Co., supra,* 505 F. 2d at 613.[14] Interpreting the 180-day provision as a statute of limitation is "flatly in conflict with [that section]" and would bar the Commis-

[14] The reason for making the 1972 amendments applicable to cases pending before the Commission was explained by the Attorney General in a letter quoted in *Equal Employment Opportunity Commission* v. *Christiansburg Garment Co., Inc.,* 376 F.Supp. 1067, 1074 (W.D. Va.):

> [T]he present provisions of S. 2515 (Se. 13) contemplate that the new enforcement provisions would only apply to charges filed after its effective date. We see no reason why the many thousands of persons who have filed charges which are still being processed and who have waited as long as 18 months to two years for resolution of them should not have the benefit of the new enforcement authority.

sion from bringing enforcement actions on those charges "despite explicit congressional intent that two-year-old charges 'have the benefit of the new enforcement authority.'" *Equal Employment Opportunity Commission* v. *Kimberly-Clark Corp., supra,* 511 F. 2d at 1357-1358.

The claim that the 180-day period constitutes a statute of limitations for Commission enforcement actions therefore has no more support in the underlying congressional purpose and legislative history than it does in the statutory language. A 180-day limitation period would be contrary to the intent expressed throughout the Act and its history to extend rather than limit effective Title VII protections. Nor would such a limitation square with the Commission's two responsibilities of conciliation and litigation. "The congressional purpose that the possibilities of voluntary compliance by agreement be first thoroughly explored and the congressional purpose that judicial enforcement proceedings be primarily the province and responsibility of the Commission may be harmonized but not if a 180-day period from the filing of the charge is imposed for the filing of judicial proceedings." *Equal Employment Opportunity Commission* v. *Cleveland Mills Co., supra,* 502 F. 2d at 157.[15]

[15] Petitioner argues that if an employer is engaged in a continuing violation, a new charge could be filed that would restart the running of the limitation period (Br. 33). Such an approach "would serve no purpose other than the creation of an additional procedural technicality." *Love* v. *Pullman Co.,* 404 U.S. 522, 526. As the court said in *Equal*

II

COMMISSION ENFORCEMENT ACTIONS ARE NOT SUBJECT TO STATE STATUTES OF LIMITATION

Petitioner states broadly that "this Court has repeatedly held that suits filed under [federal] statutes [that contain no limitation period] are governed by the most analogous state limitation period" (Br. 34). But the cases upon which petitioner relies for that proposition involved only private actions brought under such statutes. See, *e.g.*, *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454. Cf. *Runyan* v. *McCrary*, 427 U.S. 160, 180. The rule is otherwise when the federal government itself exercises a right to sue under a federal statute.[16]

Employment Opportunity Commission v. *Cleveland Mills Co.*, *supra*, 502 F. 2d at 157:

> [Limiting the Commission's right to sue to a period of 180 days following the filing of the charge] would necessitate the filing of multiple charges and would further complicate the Commission's work with technicalities serving no useful purpose. If the processes of investigation and conciliation are proceeding actively 180 days after the filing of the charge, the Act's purposes are served by permitting the administrative processes to proceed to completion as rapidly as possible. Discontinuance and disruption in commencing new proceedings would serve no such purpose.

[16] Indeed, private suits to enforce rights created by Congress have been held not to be subject to state statutes of limitations when the sole remedy is in equity. *Holmberg* v. *Armbrecht*, 327 U.S. 392.

Such suits are subject to state statutes of limitations only where the congressional intent clearly requires that result. *United States* v. *Nashville, Chattanooga & St. Louis Railway Co.*, 118 U.S. 120, 125. "It has always been the rule that statutes of limitation do not apply to the United States in the absence of a clear and manifest congressional intent that they shall apply." *United States* v. *De Queen and Eastern Railroad Co.*, 271 F. 2d 597, 600 (C.A. 8). This rule is grounded in considerations of federalism and reflects the constitutional judgment that within its area of competence the federal government must be free to act without state interference.

The Act by its terms does not subject the Commission's enforcement litigation to state statutes of limitations.[17] Nor is there any indication in the legislative history of a congressional intent that state statutes would govern the Commission's enforcement efforts. Accordingly, under the settled rule pertaining to government litigation, this action is not subject to the state limitations upon which petitioner relies.

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[17] Petitioner mistakenly relies (Br. 41 n. 60) on 42 U.S.C. 1988. That statute provides for the application of state law only where federal law is "deficient in the provisions necessary to furnish suitable remedies and punish offenses." In other words, state law applies only to the extent necessary to further the purpose of the Act to vindicate civil rights. In contrast, a statute of limitations would frustrate that purpose. Accordingly, such statutes do not "furnish suitable remedies and punish offenses" within the meaning of 42 U.S.C. 1988.

Application of state statutes of limitations, moreover, would be inconsistent with the Title VII enforcement scheme. Many of the considerations discussed above with respect to the 180-day provision also refute the suggestion that Congress intended the Commission's enforcement actions to be subject to state statutes of limitations. Especially in those jurisdictions with short limitation periods, application of state limitation statutes would jeopardize efforts at conciliation, encourage premature litigation, and thwart the underlying statutory purposes of eradicating discrimination in employment.

Although petitioner is not explicit on this point, presumably it would argue that a state statute of limitation would run from the time the discriminatory act was committed. That was the understanding of the district court (A. 22). But such a rule would be unworkable. The Commission has no jurisdiction to act until a charge is filed, which, as has been demonstrated above, may occur as much as 300 days after the discriminatory act. The Commission is barred by Section 706(f) from bringing an enforcement action within 30 days of the filing of the charge, and it may not thereafter institute litigation until after it has investigated, found reasonable cause, and attempted conciliation. *Patterson* v. *American Tobacco Co., supra; Equal Employment Opportunity Commission* v. *Hickey-Mitchell Co., supra.* In view of the enormous backlog of charges and the time-consuming nature of the required investigatory and conciliatory procedures, the Commission often would

be unable to complete those procedures within the abbreviated limitation period petitioner would have this Court impose.

The legal and practical obstacles to the bringing of timely actions by the Commission under state statutes of limitations would be largely removed by suspending the running of such statutes until the federal right of action fully ripens. *Cf. McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221. Indeed, it would appear that the cause of action does not "accrue," and therefore that any applicable statute of limitations by its own terms would not even begin to run, until the federal right of action ripens and the potential plaintiffs are first entitled to bring suit.

The Commission's right to sue does not ripen until it "has been unable to secure from the respondent a conciliation agreement acceptable to the Commission" (Section 706(f)(1)) or, in other words, until the Commission finally determines that its conciliation efforts have failed. See, *e.g.*, *Patterson* v. *American Tobacco Co., supra.* That did not occur here until September 13, 1973 (A. 7), and this action was instituted within six months thereafter (A. 9). Thus even if petitioner is correct in its contention that state statutes of limitation apply to enforcement actions brought by the Commission, this action was brought within the pertinent limitation period and so was not barred.

Even so, it is unlikely that Congress intended to subject the Commission to the vagaries of state statutes of limitations. Nothing in the legislative history suggests that Congress believed that the employment

practices of corporations operating multistate businesses would or should be varyingly susceptible to correction depending on the state in which suit is brought challenging those practices. Moreover, in many jurisdictions there may be substantial uncertainty about which of several statutes of limitations should apply. As one commentator has noted, if Congress has not decided what the appropriate limitation period should be, "the pretense that state legislatures had decided it leads only to confusion." Note, *A Limitation on Actions for Deprivation of Federal Rights*, 68 Colum. L. Rev. 763, 771 (1968). This Court recognized this problem a century ago in *United States* v. *Thompson*, 98 U.S. 486, 491:

> The limitations in like cases may be different in each State, and they may be changed at pleasure, from time to time. The government of the Union would in this respect be at the mercy of the States. How that mercy would in many cases be exercised it is not difficult to foresee. The constitutional relations of the head and the members would be reversed, and confusion and other serious evils would not fail to ensue.

The public interest character of the Commission's enforcement actions precludes application of state statutes of limitation. Cf. *United States* v. *Summerlin*, 310 U.S. 414; *Trbovich* v. *United Mine Workers*, 404 U.S. 528. See also *National Licorice Co.* v. *National Labor Relations Board*, 309 U.S. 350, 362; *Nabors* v. *National Labor Relations Board*, 323 F. 2d 686, 688-689 (C.A. 5). The enforcement of a national policy against employment discrimination, like enforcement of federal statutes governing health, labor relations, and business, is a matter of vital government concern. Congress created the Commission to eliminate unlawful employment discrimination, a mission this Court has characterized as being of the highest priority. *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 47.

Congress stated that "the Commission has the basic responsibility to achieve the objectives of Title VII." H.R. Rep. No. 92-238, *supra*, at 14 (Legislative History at 74). Thus a suit to enforce Title VII rights "involve[s] the vindication of a major public interest." *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 778 n. 40. The interest of private parties in the outcome of such litigation does not deprive it of its public character. *Ibid.* See also *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-418.

These considerations have led the courts of appeals to hold, without exception, that when the Commission sues to enjoin unlawful employment practices, it is acting as the sovereign in furthering the public interest and therefore is not subject to state limitations periods. See *Equal Employment Opportunity Commission* v. *Griffin Wheel Co.*, 511 F. 2d 456 (C.A. 5), affirmed on rehearing, 521 F. 2d 223; *Equal Employment Opportunity Commission* v. *Kimberly-Clark Corp.*, *supra*. The Sixth Circuit correctly observed in the latter case (511 F. 2d at 1359):

> [T]he eradication of discrimination by race and sex promotes public interests and transcends private interests. * * * "[T]he Commission may, in the public interest, provide relief which goes beyond the limited interests of the charging parties." Thus, the EEOC represents the public interest when it sues to enforce Title VII, not solely the interests of the private charging parties.

Petitioner nevertheless argues, relying on *Equal Employment Opportunity Commission* v. *Griffin Wheel Co.*, *supra*, that at least that portion of the Commission's suit that seeks back pay for individual victims of discrimination implicates only private rights and therefore should be subject to the state statute of limitation. But subsequent to the Fifth Circuit's decision in *Griffin Wheel*, this Court has had occasion to emphasize the public character of back pay awards. *Franks* v. *Bowman Transportation Co.*, *supra*; *Albemarle Paper Co.* v. *Moody*, *supra*. In *Albemarle Paper*, the Court referred to the similarity in this respect of Title VII and the National Labor Relations Act, in both of which "making the workers whole for losses suffered" plays an important role in the "vindication of the public policy" (422 U.S. at 419).[18] Cf. *Nathanson* v. *National Labor Relations Board*, 344 U.S. 25, 27.

Because back pay is such a fundamental element in the statutory scheme for protection against em-

[18] The Court noted that the back pay provision of Title VII was modeled after the National Labor Relations Act (422 U.S. at 419).

ployment discrimination, any distinction between injunctive and back pay claims for statute of limitations purposes would be artificial and inappropriate. This Court has previously held the United States immune from a state limitation period where its suit to collect money on behalf of private individuals was also a vehicle for achievement of public policy objectives.[19] See, *e.g.*, *United States* v. *Minnesota*, 270 U.S. 181, 196. As the Court has noted, "[u]nless expressly waived, [immunity from state limitations periods] is

[19] The role of the Commission in Title VII enforcement contrasts sharply with the situation presented by *United States* v. *Beebe*, 127 U.S. 338, where the United States was merely a formal plaintiff. In *Beebe* the United States brought suit against the heirs of an individual who had fraudulently obtained patents for land. Despite the absence of any statute authorizing suit, the Court allowed the government to file the action but held that it was subject to the applicable state limitation period since the private parties rather than the United States were the real parties in interest. The Court reasoned (127 U.S. at 347; emphasis added):

> We are of the opinion that when the government is a mere formal complainant in a suit, *not for the purpose of asserting any public right or protecting any public interest* * * *, but merely to form a conduit through which one private person can conduct litigation against another private person, a court of equity will not be restrained from administering the equities existing between the real parties by any exemption of the Government designed for the protection of the rights of the United States alone.

By contrast, when the Commission files suit to eliminate unlawful employment practices and seeks back pay, it is discharging its responsibility to achieve the objectives of Title VII and is not in reality suing on behalf of private parties alone.

implied in all federal enactments." *Board of Commissioners of Jackson County* v. *United States*, 308 U.S. 343, 351. The same reasoning is applicable here, and the same result is appropriate.

Petitioner argues that application here of the long-standing doctrine precluding application of state limitations to federal actions would allow the Commission to sue at any time without limitation, that respondents will be prejudiced by the litigation of stale claims, and that Congress could not have intended that result. But as the Sixth Circuit noted in rejecting the same contention in *Equal Employment Opportunity Commission* v. *Kimberly-Clark Corp.*, *supra*, 511 F. 2d at 1358 n. 9: "It is not unusual for a provision authorizing the federal government to enforce constitutional rights to have no statute of limitations attached." Neither the public accommodations nor the public facilities titles of the Civil Rights Act of 1964, 78 Stat. 243 *et seq.* and 246 *et seq.*, 42 U.S.C. 2000a *et seq.* and 2000b *et seq.*, contain any limitation on the filing of suits alleging their violation. Moreover, where Congress has imposed a statute of limitations in other public policy statutes, the period of time allowed has been sufficient to prevent frustration of the remedial purposes of the Act. See, *e.g.*, Section 4B of the Clayton Antitrust Act, as added, 69 Stat. 283, 15 U.S.C. 15b (4-year period).

Petitioner's fear that stale litigation will cause prejudice appears exaggerated. It cannot be "state[d], in the abstract, that prejudice by reason of stale claims will be visited upon employers." *Equal*

Employment Opportunity Commission v. *E. I. du-Pont de Nemours and Co.*, *supra*, 516 F. 2d at 1302. As the Sixth Circuit stated in *Equal Employment Opportunity Commission* v. *Kimberly-Clark Corp.*, *supra*, 511 F. 2d at 1358 n. 9:

> Use of a truly "stale" charge will mean that injunctive relief is probably unwarranted under traditional equitable principles. Furthermore, Congress has expressly limited employers' liability for back pay to two years of a charge's filing.

Moreover, any prejudice from delays is likely to be felt more strongly by the Commission, which is the party bearing the burden of proving that discrimination occurred.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 1977.

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Service of the within and receipt of a copy thereof is hereby admitted this ..... day of April, A.D. 1977.

IN THE

Supreme Court of the United States

October Term, 1976
No. 76-99

OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA,

Petitioner,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

REPLY BRIEF FOR THE PETITIONER.

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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REPLY BRIEF FOR THE PETITIONER.

ARGUMENT.

A. The 180-Day Federal Limitation Period.

With regard to the 180-day language in Title VII, only five points raised in the EEOC's Brief warrant a response, all other points contained therein having been fully dealt with in Petitioner's Opening Brief.

First, the threshold problem for the EEOC in this case is the necessity of giving *some* meaning to the 180-day provision as an alternative to Petitioner's contention that this language constitutes a limitation upon the EEOC's right to sue. Thus, the EEOC argues to this Court that the 180-day provision is "merely a temporary bar to institution of a private action."

EEOC Brief, pp. 6, 16.[1] However, this argument is a disingenuous one, for the EEOC's *own* actions refute the very interpretation which it urges to this Court. The fact is that in numerous other cases the EEOC has insisted that the 180-day provision does *not* constitute a temporary bar to a private suit during the 180-day period.[2] Furthermore, the EEOC's practice is to issue "right to sue" letters on request within the 180-day period. *SCHLEI & GROSSMAN* 776. The EEOC, therefore, is here urging this Court to accept an interpretation of the language in question which is *totally at odds* with its practice and the interpretation it has urged or supported before innumerable federal judges prior to today.[3]

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[1]Undoubtedly because of the EEOC's concession that it *never* sent a formal "right to sue" notice to the charging party in this case (EEOC Brief, p. 4, n. 3) and because of its inability to deny that its regular practice is *never* to send such notice unless specifically requested to do so (See B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 766-77 (1976) [hereinafter cited as SCHLEI & GROSSMAN], the EEOC does not, and obviously cannot, contend that the 180-day language is a notice requirement.

[2]*E.g. Bauman v. Union Oil Co.*, 400 F.Supp. 1021, 1027 (N.D. Cal. 1973) ("Plaintiff and the Commission argue that a suit letter issued prior to 180 days is valid."); *Gary v. Industrial Indemnity Co.*, 7 FEP 193, 195 (N.D. Cal. 1973) (EEOC argued that "[w]e do not believe Congress intended to delay the right of aggrieved persons to file suit" when the EEOC will not act within 180 days); *Westerlund v. Fireman's Fund Ins. Co.*, 11 FEP 744, 745 (N.D. Cal. 1975) (EEOC amicus brief argued no temporary bar); *Howard v. Mercantile Commerce Trust Co.*, 10 FEP 158, 158-59 (E.D. Mo. 1974); *Lewis v. FMC Corp.*, 11 FEP 31, 34 (N.D. Cal. 1975); *Budreck v. Crocker Nat'l Bank*, 407 F.Supp. 635 (N.D. Cal. 1976).

[3]Another example of the EEOC's propensity to argue positions to this Court different from those it has argued to lower courts is revealed by the statement in its Brief that the Commission lacks power to bring its own enforcement action when the complainant files his or her own suit. EEOC Brief, p. 22, n.9. Yet the EEOC argued, and prevailed on, exactly the opposite interpretation before the Third Circuit in *EEOC v. North Hills Passavant Hospital*, 554 F.2d 664 (3d Cir. 1976). If, as the EEOC *now* contends, it cannot sue independently once the charging party has filed suit, this is strong evidence that the EEOC's right to sue on its own expires after 180 days. Petitioner's Opening Brief, p. 24.

These inconsistencies simply reveal the EEOC's belief that the 180-day statutory language in question either means nothing at all or whatever the EEOC may find convenient to argue in the context of a particular case. In other words, the EEOC simply has *no* consistent explanation of what the 180-day provision means. Yet Petitioner has consistently argued that this 180-day language means exactly what Senator Dominick and Senator Javits explained that it meant shortly before the provision was passed:

Senator Dominick:

> ". . . the time period within which the Commission may file a civil action . . ."

Senator Javits:

> ". . . the allowable time for the Commission to move into a given situation."[4]

Second, the EEOC contends that Congress considered but rejected a provision that would have terminated the Commission's authority upon the filing of a private action after the expiration of 180 days. EEOC Brief, pp. 6, 17. However, that provision was part of the cease and desist bill that was finally *rejected* by Con-

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[4]1972 LEG. HIST. 1347 (Senator Dominick); 1972 LEG. HIST. 1528 (Senator Javits). The EEOC's argument (EEOC Brief, p. 21, n. 8) that both Senators contradicted themselves on this point two weeks earlier is based solely on its reading of the earlier quotations out of context. As explained in Petitioner's Opening Brief at pages 21-23, the remarks quoted by the EEOC in its brief were clearly directed by the Senators to when the EEOC could first sue, not when it could last sue.

gress in favor of court enforcement because court enforcement was deemed *more* expeditious than cease and desist! In any event, the court enforcement system and the cease and desist proposal involved two fundamentally different procedures.[5] In these circumstances, it is obviously unreasonable to assume that Congress intended no time limitation whatever on the more expeditious system that it did enact.

Third, the EEOC contends that the Joint Conference Committee's use of the word "elect" to describe the charging party's right to sue establishes that the EEOC's right to sue must be interminable in order that the charging party has "the option either to sue in his own name or to rely upon the Commission's enforcement efforts." EEOC Brief, p. 22. However, that interpretation of the word "elect" is refuted by the quotation itself, which refers to allowing the person aggrieved "to elect to pursue his or her own remedy" where there is "*dismissal of the charge.*" [Emphasis added]. Obviously, therefore, the word "elect" was used in the sense of the charging party's right to decide to sue or not to sue, not the right to decide to sue or have the EEOC sue. Furthermore, the irony of the EEOC's citation of this passage is that, because of the EEOC's refusal to act within the 180 days, the Joint Committee's determination "to make sure that the person aggrieved does not have to endure lengthy delays" has been totally frustrated by the EEOC.[6]

[5]For example, in an administrative cease and desist procedure which also gives the charging party a right to sue in court, obviously it would be necessary to state what would happen to the cease and desist process once the private litigant files a court action. That would not be necessary where the sole enforcement procedure is through filing suit in court.

[6]The EEOC also attempts to make much of the argument that Congress knew how to state an explicit limitation when

Fourth, the EEOC expresses concern that "thousands of complainants" who are "poor and unable to afford legal representation" would be "forced to bring suit themselves" if the 180-day provision were read as a limitation on the EEOC's right to sue. EEOC Brief, p. 26. In truth what would happen is that instead of having to wait three to five to seven years for the EEOC to act, these "thousands of complainants" would be promptly notified of the significant array of statutory rights conferred on them by Congress—the right to bring suit, the right to have court-appointed counsel, the right to commence action without payment of fees, costs or security, and the right to a reasonable attorneys' fee award if they prevail—rights which the EEOC conveniently ignores and thereby denies because of its total disregard of the 180-day provision.

Fifth, the EEOC makes much of its conciliation role,[7] assumes that a time limitation would "nullify" its conciliation efforts by requiring it to sue prematurely, and then theorizes that Congress could not have intended this result. EEOC Brief, pp. 24-27. But the EEOC's view that infinity is the only parameter on its right to sue reveals a total ignorance of both the legislative determination made in 1972 and the realities of modern practice, for Congress recognized that it was not the *interminable* potential of suit but the *imminence* of actual suit which induces conciliation and compliance. Indeed, Senator Dominick—the author

it wanted to (EEOC Brief, pp. 6-7, 18 n.7). Yet only two of those statutory "shall" commands are directed at the EEOC, and once again the EEOC's regular practice has been *not* to do what Congress said it "shall" do: (1) 10-day notice to respondents and (2) the 180-day provision here in question. *See SCHLEI & GROSSMAN* 774-775, 776.

[7]Despite its willingness to issue right to sue letters before the conciliation process is complete.

and principal spokesman for the court enforcement bill which passed—explained the advantage of court enforcement as follows:

> "The *imminence* of court action, coupled with the threat of adverse publicity and immediately enforceable orders will serve as a powerful inducement to voluntary settlement." [Emphasis added]."[8]

That was precisely the point made by Judge Moore in his dissenting opinion in *EEOC v. Louisville & Nashville R.R. Co.*, 505 F.2d 610, 619 (5th Cir. 1974), *cert. denied*, 423 U.S. 824 (1975), wherein he concluded that the 180-day provision is a limitation on the EEOC's right to sue:

> "It is well-known that an imminent deadline, and in particular the pendency of a lawsuit, is apt to make even the most hardline bargainers soften their position. Thus, the 180-day limit on the Commission's right to sue seems likely to promote settlements."

This, of course, is the full answer to the EEOC's concern (EEOC Brief, pp. 8, 25) that recalcitrant respondents will deliberately prolong the conciliation process in the hope of beating the 180-day limitation. As any experienced lawyer knows, nothing will bring that respondent to a serious position like the certainty of a lawsuit in, for example, 15 days unless he modifies his position. Where an acceptable conciliation agreement is not then obtained within the period specified, the statutory prerequisites to suit would be met,[9] and suit would then be properly filed, after which

[8]1972 *LEG. HIST.* 794.

[9]See EEOC Brief, pp. 15, 19 and 25.

time the court could of course permit up to 60 more days of conciliation effort if appropriate.

Indeed, the existence of a statutory limitation period is the surest guarantee of prompt agency action and effective conciliation on employment discrimination claims. By contrast, the EEOC's increasing backlog over the last five years is the clearest proof that interminable delay frustrates rather than promotes the effective administration of Title VII.

Finally, while acknowledging the importance to Congress of speedy administration, the EEOC characterizes speedy administration as subordinate to effective administration. But the EEOC is missing the entire point of the 1972 debate: that "justice delayed is justice denied" and thus effective administration and speedy administration cannot be divorced from one another.

Perhaps recognizing the fatal defects in its position, the EEOC takes final refuge in its own incompetence by insisting that Congress knew in 1972 that it could not act within 180 days and thus could not have intended that limitation on its right to sue. *Yet if it were true that Congress knew that the EEOC could not act within 180 days, why would Congress have forced aggrieved parties to wait for six months of EEOC inaction before having the right to file suit on their own?* Nowhere does the EEOC offer any answer to that question.

The reason for the 180-day wait is obvious, for the *only* justification for forcing the aggrieved party to wait six months before filing suit was the Congressional conviction that the EEOC *would* be acting during that period, taking steps which would have a genuine prospect of resolving the case in less than 180 days. Thus, the fact that charging parties may

not act within the first 180 days is the clearest proof of all that Congress was convinced that the EEOC *would* act within that time period. Indeed, Congress specifically expanded the time period from 60 days to 180 days in 1972 just to be certain that the EEOC would have time to act.

Thus, this Court's holding that the 180-day language is a limitation on the EEOC's right to sue will further the purposes of Title VII, while leaving Congress with the responsibility of providing further assistance to the EEOC if necessary to discharge the duties assigned to that agency in 1972. On the other hand, a decision by this Court holding that the EEOC's right to sue is interminable would in fact frustrate the objectives of Title VII by causing the delay of justice—and thus its denial—to be all the more certain and permanent.

B. The Applicability of the Most Analogous State Limitation Period.

The Ninth Circuit decision below that state statutes of limitation are inapplicable to EEOC suits to collect back pay for private individuals was predicated in part on that court's analogy to National Labor Relations Board enforcement procedures (A. 32-33). Petitioner's Opening Brief at pages 41-43 demonstrated the fallacy of that analogy, and it is significant that the EEOC in its Brief does not even attempt to support the Ninth Circuit's position in this regard. However, four points raised by the EEOC on the subject of the applicability of the most analogous state limitation period do warrant discussion.

First, the EEOC's characterization (EEOC Brief, p. 31) of the decision in *United States v. Nashville,*

Chattanooga & St. Louis Railway Co., 118 U.S. 120 (1886), as demonstrating that state limitations periods apply only where there is an express Congressional intention to that effect is superseded by cases such as *United States v. Beebe,* 127 U.S. 338 (1888), and is inapplicable to the instant suit. In the *Nashville* case, the United States sued to collect money for its treasury on bonds owned by the United States, and the Court characterized the United States as "asserting rights vested in it as a sovereign government."[10] *Nashville* is, therefore, cited among and consistent with the "sovereign immunity" cases discussed in Petitioner's Opening Brief at pages 37-38. Where, however, as here, the United States is suing to collect money for private individuals, it is suing not as a sovereign but as a conduit for private individuals who could have sued themselves and is therefore governed by state statutes of limitation as held in the *Beebe* case. Indeed, the EEOC itself states that Congress gave it "statutory authority to bring civil actions to enforce *private rights.*" EEOC Brief, p. 5 [Emphasis added].[11]

Second, the EEOC is incorrect in stating (EEOC Brief, p. 31) that the Act by its terms does not subject the Commission's enforcement litigation to state limitations periods. Not only is 42 U.S.C. Section 1988

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[10]118 U.S. 120, 125 (1886).

[11]The *Minnesota* and *Jackson County* decisions cited by the EEOC on pages 37-38 are both distinguished by the fact that Title VII plaintiffs are not wards of the state, but citizens armed with statutory rights to sue on their own with court-appointed counsel and attorneys' fees, and are thus themselves an integral part of the enforcement scheme, and by the fact—discussed in text *infra* at pages 9-10 that Congress has enacted statutory provisions under which state statutes of limitation should govern if no federal limitations period is found in Title VII.

specifically referred to in the majority decision in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 464 n.10 (1975), as suggesting a Congressional intent to apply state statutes of limitation, but indeed, Section 708 of Title VII itself specifically states:

> "Nothing in this subchapter [Title VII] shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter." 42 U.S.C.A. § 2000e-7 (1974).

As the word "person" is specifically defined by the Act in Section 701(a) to include "governmental agencies" and therefore includes the EEOC,[12] Section 708 establishes that nothing in the Act relieves the EEOC from any liability or duty under any state law, including the duty to bring an action within the appropriate state limitations period and the liability and penalty of having its case dismissed if it fails to do so.[13]

The EEOC cannot escape this conclusion by raising the specter of thereby being subjected to the "vagaries" of state statutes of limitation. Multistate businesses and national labor unions confront 50 state limitation periods every day under Section 301 of the Labor

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[12]See generally *Rogers v. EEOC*, 14 FEP 625 (D.C. Cir. 1977) (EEOC covered by Title VII).

[13]Since no distinction was drawn by Congress between injunctive relief and back pay, this constitutes another persuasive reason why the distinction so drawn in *EEOC v. Griffin Wheel Co.*, 511 F.2d 456, 459, *aff'd on rehearing*, 521 F.2d 223 (5th Cir. 1975), should be rejected. See Petitioner's Opening Brief, pp. 43-45.

Management Relations Act, 29 U.S.C. §185, without discernible difficulty. See *Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966). Indeed, that this Court has held state statutes of limitation applicable in Section 301 actions is all the more significant in light of the Court's holding that it should fashion a body of federal common law to govern Section 301 suits. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456 (1957). If national unions and multistate businesses can comply with state limitations periods, what is so special about the EEOC? Certainly it cannot be that the EEOC is suing under Title VII, because there is nothing "peculiar to a federal civil rights action that would justify special reluctance in applying state law." *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 464 (1975).[14]

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[14]The EEOC makes passing reference in a footnote to the decision of this Court in *Holmberg v. Armbrecht*, 327 U.S. 392 (1946), for the proposition that in a private suit to enforce a federal right, where the sole remedy is in equity, a state statute of limitations will not be applied. First, any alleged applicability of that concept in this case, it is to be noted, was rejected by the Court of Appeals for the Fifth Circuit in *U.S. v. Georgia Power Company*, 474 F.2d 906, 923 n.22 (5th Cir. 1973), at least insofar as back pay is concerned. Second, in *Holmberg*, unlike the instant case, there were no Congressional statutes making specific reference to the use of state law. In fact, in *Holmberg* it was essential to federal policy concerning fraudulent concealment that federal law be applied in order to preserve the right of action which otherwise would have been barred by the state statute of limitations. By contrast, where the application of a state statute of limitations would not frustrate federal policy, even though important federal policy considerations were at issue, *Holmberg* has not been followed. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975); *Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966). In the instant case, the application of a state limitations period would actually further the purposes of the Act. *Holmberg* has been recognized as requiring such an analysis of how the underlying statute's purposes will be fulfilled. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 470 (1975) (dissenting opinion); *Auto Workers v. Hoosier* Cardinal Corp., 383 U.S. 696, 709 (1966) (dissenting opinion).

Third, the EEOC argues that the statute of limitations should not begin to run until all of its administrative actions are completed. EEOC Brief, p. 33. However, this argument totally ignores the fact that at all times after a charge is filed, the EEOC has total control over the case and thus the ability at any time to complete its investigation and conciliation process and properly file suit. SCHLEI & GROSSMAN 1030. Further, it is obvious that acceptance of the EEOC's argument would totally negate the application of a state limitations period, for the exception would swallow the rule. *Cf. Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975).

Equally specious is the EEOC's argument (EEOC Brief, p. 32) that state statutes cannot be applicable because they might run before the EEOC is empowered to bring suit, for Congress has certainly made an explicit grant of authority of 180 days within which the EEOC may bring suit and that express grant would obviously prevail over any state limitation period which might arguably have run before the 180 days had expired.

Conclusion.

In closing its Brief, the EEOC contends that it *should* have an interminable right to sue *because* the prejudice to respondents resulting from lengthy delays "appears exaggerated" and any prejudice is "likely to be felt more strongly by the Commission." (EEOC Brief, pp. 38-39). The EEOC thus focuses on the alleged prejudice to *its* position, without a word about unfairness to charging parties, as though Congress had created Title VII for the convenience and benefit of the EEOC rather than for the protection of victims

of discrimination. This myopic view of the EEOC is the root of the entire problem in this case and clearly reflects the EEOC's refusal to come to grips with the fact that the purposes of Title VII would be furthered, not frustrated, by the position advocated by the Petitioner to this Court.

Dated: April 11, 1977.

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MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE FOR THE TEXAS ASSOCIATION OF BUSINESS

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INDEX

INDEX—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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Supreme Court of the United States

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MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE FOR THE TEXAS ASSOCIATION OF BUSINESS

Pursuant to Rule 42(3) of the Rules of this Court, the Texas Association of Business respectfully moves for leave to file the attached brief amicus curiae in this case in support of the position of Petitioner. Counsel for the amicus has sought the consent of the parties involved: attorneys for the Petitioner refused, the attorneys for Respondent consented to the filing of this amicus brief.

INTERESTS OF THE AMICUS

1. The amicus here is an association representing approximately four thousand businesses in the State of Texas. The vast majority of these businesses employ more than fifteen employees in industries affecting commerce and are thus subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* Established in 1922, the Texas Association of Business, formerly the Texas Manufacturers' Association, is a statewide alliance of businesses working to strengthen the economy and to ensure a reasonable balance of governmental regulation of business in Texas and the nation to protect the public interest by maintaining the health of the free enterprise system.

2. The amicus and its members have a particularly vital interest in the issues presented here. Many of its members have been the subject of charges filed with the Equal Employment Opportunity Commission which have been subjected to administrative delays of varying length. These delays have frustrated the conciliation process mandated by Title VII and have prejudiced the litigation positions of several member businesses. Some of its members are currently in litigation with the EEOC in which the issue of prejudicial administrative delays by the EEOC has been raised. *E.g.*, *EEOC* v. *Texas Instruments Incorporated*, Civil Action No. 3-75-1093G (N.D. Texas, Dallas Division) (pending). Resolution of the present issues is therefore of vital concern to the amicus because the business condition and litigation posture of many of its members will be substantially affected by the outcome of this case.

3. The essential issue presented by this case is whether there is any time limit applicable to the EEOC's power to file suit under Title VII. The effect of the decision

below is that there is no such time limit, no matter how long or unreasonable the delay and no matter how extreme the prejudice to the opposing party. This decision conflicts with the decisions of the Fifth Circuit in *United States* v. *Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973) and in *Equal Employment Opportunity Commission* v. *Griffin Wheel Company*, 511 F.2d 456, *clarified*, 521 F.2d 223 (5th Cir. 1975), which govern the federal district courts having jurisdiction over the amicus and its member businesses.

4. The amicus believes that the parties in their briefs below, and in their certiorari papers to this Court, did not adequately present several questions. First, the parties did not fully explicate the public policies of fairness and repose served by statutes of limitations and relate those policies to the essential issue presented here. Since the delays of the EEOC have arisen in many factual contexts quite different from those in which Petitioner's case developed, the amicus urges that it, as the representative of a broad group of employers subject to Title VII, is especially qualified to assist the Court in representing the broad range of interests and factual patterns affected by the important issues raised in this case.

Second, the parties failed to analyze correctly and distinguish between the immunity allowed the government in a suit affecting sovereign rights as opposed to a government suit as a conduit to affect private rights. Finally, the parties have totally failed to address the application of laches which, as one court has found,[1] presents questions of fact and law intrinsically inter-

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[1] See EEOC v. Griffin Wheel Co., 511 F.2d 456, clarified, 523 F.2d 223 (5th Cir. 1975); United States v. Georgia Power Co., 474 F.2d 906, (5th Cir. 1973). See also, EEOC v. C & D Sportswear Corp., 398 F. Supp. 300 (M.D. Ga. 1975) [no appeal taken].

twined with the questions raised here, and full analysis of these issues necessarily requires its consideration.

CONCLUSION

For the foregoing reasons, the amicus herein respectfully requests the Court to grant this motion for leave to file the attached brief amicus curiae in support of the position of Petitioner.

Respectfully submitted,

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January, 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-99

OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICUS CURIAE FOR THE TEXAS ASSOCIATION OF BUSINESS

INTERESTS OF THE AMICUS

This brief is submitted pursuant to Rule 42 of the Rules of this Court, subject to the Court's granting of the attached Motion for Leave to File a Brief as Amicus Curiae. The amicus herein supports the position of the Petitioner in this case, urging reversal of the decision by the United States Court of Appeals for the Ninth Circuit. *Occidental Life Insurance Co. of California* v. *EEOC*, 535 F.2d 533 (1976).

The interests of the amicus are stated in the attached Motion (*supra*, pp. (1)-(4)), and are not repeated herein.

ARGUMENT

ESTABLISHED LEGAL PRINCIPLES AS WELL AS CONSIDERATIONS OF PUBLIC POLICY REQUIRE REVERSAL OF THE DETERMINATION BELOW THAT THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION HAS INFINITE TIME WITHIN WHICH TO BRING A LAWSUIT UNDER TITLE VII.

Introduction And Summary Of Argument

The essential question presented here is whether the EEOC has infinite time within which to bring a suit under Section 706 of Title VII of the Civil Rights Act of 1964,[1] or conversely, whether the EEOC must file its lawsuit within time constraints required by Congress or by traditional concepts of fairness and justice which prevent litigation of claims brought after relevant evidence is lost or blurred due to the passage of time.

The court below, expressly disagreeing with the decisions of the Fifth Circuit,[2] found that the EEOC's right to sue is subject to no time limitation whatsoever. This decision, if upheld by this Court, would permit EEOC prosecution of suits filed many years after the most liberal statute of limitations would have expired. Such suits are common under current EEOC practice.[3]

The decision of the court below is plainly wrong. The statutory scheme and legislative history show that Con-

[1] 42 U.S.C. § 2000e-5 (1970).

[2] United States v. Georgia Power Co., 474 F.2d 906, 922-924 (5th Cir. 1973); EEOC v. Griffin Wheel Co., 511 F.2d 456, 458, clarified, 521 F.2d 223 (5th Cir. 1975).

[3] See cases cited at note 9, *infra*, representative of the routine of lengthy Commission delays.

gress intended to limit the EEOC's power to sue to a period within 180 days after the filing of a proper charge.[4] Even if the 180 day limit is not accepted by this Court, established legal principles require that the EEOC's right to sue be limited by the appropriate state statutes of limitations. This Court has repeatedly held that when there is no express statute of limitations applicable to a federal cause of action, the action must be filed within the most appropriate limitations period provided by state law.[5] Employment discrimination cases present no reason to alter this rule, as this Court recently held in an employment discrimination suit brought under 42 U.S.C. § 1981. *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975). Moreover, considerations of public policy support the application of state statutes of limitations to EEOC suits under Title VII. The policies of fairness and repose embodied in statutes of limitation are as applicable to Title VII suits as they are to any other litigation. This Court has indicated that considerations of prejudice, which underlie statutes of limitations, may justify denial of backpay in a Title VII case, *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 424 (1975), and has also recognized that the EEOC's administrative record in the handling of Title VII charges shows a proclivity toward "significant delay." *Johnson* v. *Railway Express Agency*, *supra*, 421 U.S. at 465 n.11. Such delay vividly illustrates the necessity for providing some limitation period within which the EEOC must act. And, application of statutes of limitation to the

[4] This issue of statutory construction was ably and forthrightly presented by Petitioner Occidental Life in the court below. We do not further argue that point in this brief, but adopt the position set forth in Petitioner's brief. We reserve our arguments herein for issues where our experience and exposure can present matters for the Court's consideration beyond the arguments we anticipate Petitioner Occidental Life will raise.

[5] See text at pp. 5-7, *infra*.

EEOC fully serves the congressional intent for expeditious enforcement of Title VII.

The Court of Appeals below failed to take the public interests embodied in a statute of limitations into consideration, ruling instead that because the EEOC is a government agency it is not subject to the general rule requiring application of state limitations periods. However, analysis shows that the court's conclusion is without basis in law and is not supported by policy. The governmental immunity on which the court relied is available only when the government sues to preserve the public treasury and property, and has been expressly withheld where the government is suing on behalf of private individuals. The interests asserted by the EEOC in an action under Section 706 of Title VII are clearly not of the sort historically entitled to immunity from limitations. This Court's characterization of the public interest served by the availability of an effective remedy once liability has been established is not to the contrary. Furthermore, proper analysis of certain "practical considerations" offered by the court below to support its ruling shows that those considerations are, in fact, far more persuasive of the need for application of a limitations period. Consideration of the court's list of factors in light of the policies underlying Title VII and statutes of limitations compels the conclusion that limitations periods are the only effective means of serving both interests simultaneously.

Finally, the amicus believes that analysis of the doctrine of laches is necessary for the Court's full understanding and consideration of the issue of time limitations on the EEOC. The issue of laches was not raised in the court below. *Occidental Life Insurance Co. of California* v. *EEOC*, 535 F.2d 533, 540 n.12 (9th Cir. 1976). However, the doctrine of laches is applicable under Title VII, as the Fifth Circuit has expressly noted

in both *United States* v. *Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973) and in *EEOC* v. *Griffin Wheel Co.*, 511 F.2d 456, *clarified*, 521 F.2d 223 (5th Cir. 1975). The doctrine is fully applicable to the EEOC where it has engaged in unreasonable delay to the prejudice of the opposing litigant.

These reasons conclusively establish that the decision of the court below is plainly wrong, and that established judicial authority requires the imposition of state statutes of limitations and laches to limit the time within which the EEOC may file a suit under Title VII.

I.

Established Legal Principles Require That State Statutes Of Limitations Be Applied To EEOC Actions Under Title VII.

This Court has frequently held that where "there is no specifically stated or otherwise relevant federal statute of limitations . . . the controlling period would ordinarily be the most appropriate one provided by state law." *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975) (Civil Rights Act of 1866). See *Auto Workers* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 703-04 (1966) (Labor Management Relations Act); *Cope* v. *Anderson*, 331 U.S. 461, 463 (1947) (National Bank Act); *O'Sullivan* v. *Felix*, 233 U.S. 318, 322 (1914) (Civil Rights Act of 1871); *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U.S. 390, 397 (1906) (Sherman Act). This result follows the congressional policy embodied in the Rules of Decision Act, 28 U.S.C. § 1652,* which provides that

> the laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be re-

* 62 Stat. 944 (1948), formerly R.S. Sec. 721.

> garded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

Citing this statute, this Court long ago established that "cases where they apply" include federal causes of action for which Congress has not expressly provided a federal statute of limitations. *Campbell* v. *City of Haverhill*, 155 U.S. 610, 614-15 (1895); *McClaine* v. *Rankin*, 197 U.S. 154, 158 (1905); *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, *supra*, at 397. This rule applies whether the federal cause of action asserted is equitable or legal in nature. *Johnson* v. *Railway Express Agency, Inc.*, *supra*, at 460; *Cope* v. *Anderson*, *supra*, at 463-64. Its force is limited only where the application of state limitations would be inconsistent with the federal policy underlying the cause asserted,[7] which, as we demonstrate in Parts II and III below, is not the case here.

The justification for applying state statutes of limitations to federal causes of action was expressed in *Campbell* v. *Haverhill*, *supra*, at 616-17, where this Court ruled that state statutes of limitations apply to suits for infringement under the federal Patent Act:

> Unless this be the law, we have the anomaly of a distinct class of actions subject to no limitation whatever; a class of privileged plaintiffs who in this particular, are outside the pale of the law, and subject to no limitation of time in which they may institute their actions. . . . As was said by Chief Justice Marshall in Adams v. Woods, 6 U.S. (2 Cranch) 336, 342 of a similar statute: "This would be utterly repugnant to the genius of our laws. In a country within which not even treason can be prosecuted after the lapse of three years, it can scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture."

[7] Johnson v. Railway Express Agency, Inc., *supra*, at 465; Auto Workers v. Hoosier Cardinal Corp., *supra*, at 706-07.

The congressional power to overrule such an interpretation of its silence only confirms the general propriety of this judicial practice. See *Auto Workers* v. *Hoosier Cardinal Corp.*, *supra*, 383 U.S. at 704.

In an action under 42 U.S.C. § 1981, this Court has recently recognized that there is nothing peculiar to a federal civil rights action that would justify special reluctance in applying state statutes of limitations. *Johnson* v. *Railway Express Agency, Inc.*, *supra*, 421 U.S. at 464. Indeed, this Court in *Johnson* suggested that application of state statutes of limitations in employment discrimination suits is especially appropriate in light of 42 U.S.C. § 1988, which parallels the Rules of Decision Act in providing that state law shall apply in cases under certain civil rights laws where there is no federal law to apply.[8] Since federal causes of action under Title VII vindicate the same interests as are involved in an action under 42 U.S.C. § 1981, consistent application of federal law requires that state statutes of limitations be applied to EEOC actions under Title VII.

II.

Public Policy Dictates The Application Of State Statutes Of Limitations To EEOC Actions Under Title VII.

Not only does the application of established federal law require that state statutes of limitation be applied to

[8] 42 U.S.C. § 1988 provides:

> The jurisdiction . . . conferred . . . by . . . this chapter and Title 18, for the protection of . . . civil rights . . . shall be exercised and enforced in conformity with the laws of the United States . . .; but in all cases where they are not adopted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified . . . of the State wherein the court . . . is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in disposition of the cause. . . .

EEOC actions under Title VII but consideration of public policy dictates that result as well. We show below that application of state statutes of limitations is required by the policies of fairness and repose which underlie statutes of limitation and is entirely consistent with the salutary policies underlying Title VII. We also show that application of state statutes of limitations to bar unseasonable claims by the EEOC serves the ultimately more important public interest in having the outcome of litigation determined by the merits of the controversy rather than the accumulated advantage that accrues to the government as the passage of time makes defense more difficult.

A. *The Public Policies Of Fairness And Repose Underlying Statutes Of Limitations Are Applicable To Title VII Actions.*

A statute of limitations is a legislative determination that at some point the societal interest in fairness to a defendant outweighs the societal interest in resolution of stale claims. This determination is founded on the presumption that prejudice necessarily flows from delay in pressing a claim. This Court has so recognized, stating that a statute of limitations is designed

> to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Order of Railroad Telegraphers v. *Railway Express Agency*, 321 U.S. 342, 348-49 (1944). To this effect, this Court has said: "Statutes of limitations are primarily designed to assure fairness to defendants." *Burnett* v. *New York Central R. Co.*, 380 U.S. 424, 428 (1965). Fairness to defendants necessarily includes notice that a claim is asserted. Statutes of limitations assure such fairness by requiring that a claim be asserted in a timely fashion. Such notice prevents prejudice by the loss or erosion of evidence, enabling the defendant to preserve his evidence. Yet notice alone does not suffice, for there is much evidence that no defendant is able to preserve. Fairness also entails repose, the need to avoid perpetual jeopardy for one who was once upon a time given notice that he "might" be subject to suit at some indefinite time in the future. "[I]t can scarcely be supposed that an individual would remain forever liable . . . ." *Adams* v. *Woods*, 6 U.S. (2 Cranch) 336, 342 (1805).

This Court has recognized that the policies of fairness and repose are applicable under Title VII. In *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), the plaintiffs had not asserted their claim for backpay until five years after filing their lawsuit, which delay allegedly prejudiced the defendant. The Court held that prejudicial delay might, in the exercise of the Court's discretion, justify denial of backpay:

> A party may not be "entitled" to relief if its conduct of the cause has improperly and substantially prejudiced the other party. . . . To deny backpay because a *particular* cause has been prosecuted in an eccentric fashion, prejudicial to the other party, does not offend the broad purposes of Title VII. 422 U.S. at 424 (emphasis in original).

Thus the public policies underlying statutes of limitations have been recognized by this Court as applicable to Title VII actions.

Examination of the EEOC's record to date in enforcement of Title VII demonstrates the compelling need to

establish standards of fairness and repose applicable to the EEOC. The cases are now legion in which the EEOC has attempted to revive claims as much as six years old that have been allowed to "slumber."[9] Such delay is inherently prejudicial to a defendant for, inevitably, the older the charge the more difficult will be the preparation of a defense. This is true whether the delay is due simply to administrative backlog and inefficiency or to a strategic decision, such as a concerted strategy of accumulating individual charges to improve the EEOC's evidentiary position. Such prejudice may result from the destruction of records,[10] the fading memory of an em-

[9] See EEOC v. American Nat. Bank, 420 F. Supp. 181 (E.D. Va. 1976) (six years, six months); EEOC v. Joint Apprenticeship Committee, 7 EPD ¶ 9334 (N.D. Cal. 1974) (six years); EEOC v. Universal Warehouse Co., 11 EPD ¶ 10,658 (W.D. Tenn. 1975) (six years). See also EEOC v. Christianburg Garment Co., 367 F. Supp. 1067 (W.D. Va. 1974) (five years, seven months); EEOC v. C & D Sportswear Corp., 398 F. Supp. 300 (M.D. Ga. 1975) (five years, six months); EEOC v. Bartenders International Union, 369 F. Supp. 827 (N.D. Cal. 1973) (five years, three months); EEOC v. Moore Group, Inc., 11 EPD ¶ 10,886, on rehearing, 416 F. Supp. 1002 (N.D. Ga. 1976) (five years, one month); EEOC v. American Machine & Foundry, Inc., 12 EPD ¶ 11,200 (M.D. Pa. 1976) (four years, ten months); EEOC v. Union Oil Co., 369 F. Supp. 579 (N.D. Ala. 1974) (four years, seven months); EEOC v. Eagle Iron Works, 367 F. Supp. 817 (S.D. Iowa 1973) (four years, three months); EEOC v. J.C. Penney Company, Inc., 11 EPD ¶ 10,661 (N.D. Ala. 1975) (four years, one month).

[10] See EEOC v. American Machine & Foundry, Inc., 12 EPD ¶ 11,200 at 5525-26, (M.D. Pa. 1976) (Defendant found to be prejudiced by EEOC delay where it properly destroyed records four and one-half years after filing of charge with EEOC and two years after last contact from EEOC); EEOC v. Moore Group, Inc., 11 EPD ¶ 10,886, on rehearing 416 F. Supp. 1002 (N.D. Ga. 1976) (Defendant found to be prejudiced by EEOC delay where it properly destroyed records five years after filing of charge with EEOC and one and one-half years after last contact from EEOC); cf. EEOC v. Joint Apprenticeship Committee, 7 EPD ¶ 9334 (N.D. Cal. 1974) (Defendant held required to preserve records six years after filing of charge with EEOC). Even the charging party might destroy his relevant records. See EEOC v. American Nat. Bank, 420 F. Supp. 181, 187 (E.D. Va. 1976).

EEOC regulations, 29 C.F.R. § 1602.14, provide that an employer may dispose of records in the ordinary course of business after six months, except where a charge has been filed or a civil action brought under Title VII, in which event all relevant personnel records must be preserved until the expiration of the aggrieved person's right to sue (90 days after EEOC determination of "cause" or "no cause") or, where suit has been brought, until termination of the lawsuit. It has been held that if the aggrieved person's right to sue has expired and no action has been brought, the employer is free under the regulations to dispose of his records. EEOC v. American Machine & Foundry, Inc., 12 EPD ¶ 11,200 (M.D. Pa. 1976); EEOC v. Moore Group, Inc., 11 EPD ¶ 10,886, on rehearing, 416 F. Supp. 1002 (N.D. Ga. 1976).

[11] See EEOC v. C & D Sportswear Corp., 398 F. Supp. 300, 302 (M.D. Ga. 1975) (Defendant found to be prejudiced by five and one-half year delay in light of age (70) of Defendant's chief witness); EEOC v. American Nat. Bank, 420 F. Supp. 181, 187 (E.D. Va. 1976) (six year delay found prejudicial to Defendant in light of age (72) of an important witness).

[12] See EEOC v. Moore Group, Inc., 11 EPD ¶ 10,886, on rehearing, 416 F. Supp. 1002 (N.D. Ga. 1976) (Defendant found to be prejudiced by five year delay when employee-witness left employment in the interim and records properly destroyed); EEOC v. American Nat. Bank, 420 F. Supp. 181, 187 (E.D. Va. 1976) (Defendant found to be prejudiced by six-year delay when three important witnesses had left its employ).

[13] This requirement was added on the floor of the House of Representatives after a finding that the EEOC's prior failure to give such notice "violates all concepts of due process." See H.R. Rep. No. 92-238, 92nd Cong., 1st Sess., at 66 (1971) (Minority Report).

ployee,[11] or the loss of other evidence such as the personal testimony of former employees who may not be located or whose testimony or cooperation may not be available.[12]

The prejudicial loss of evidence results in part from the lack of any notice requirements for EEOC lawsuits under Title VII. In the EEOC's practice, notice seems to be a concept of flexible expediency rather than one of fundamental fairness. The 1972 amendments to Title VII added a requirement that an employer receive prompt notice of a charge filed against it.[13] That notice, how-

ever, does not purport to advise the employer of all the issues that may be raised in a subsequent lawsuit, as the *Occidental* case graphically illustrates.[14] Indeed, the EEOC has been allowed by the lower courts to sue on issues far beyond those alleged in the charge. See *EEOC* v. *General Electric Co.*, 532 F.2d 359, 366 (4th Cir. 1976). While the conciliation process *may* provide timely notice of the issues, there are countless cases where even this process has been delayed for years after the filing of charges.[15] Thus an employer may not be aware of the potential issues in a lawsuit for several years *after* a charge is filed with the EEOC. During this time the employer has no idea at all what witnesses or records may be relevant to the as yet undisclosed issues.[16] The

[14] 535 F.2d at 540-42.

[15] See, e.g., EEOC v. American National Bank, 420 F. Supp. 181 (E.D. Va. 1976) (four years, eleven months after charge to completion of investigation); EEOC v. Universal Warehouse Co., 11 EPD ¶ 10,658 (W.D. Tenn. 1975) (three years, eleven months); EEOC v. C & D Sportswear Corp., 398 F. Supp. 300 (M.D. Ga. 1975) (two years, nine months); EEOC v. Moore Group, Inc., 11 EPD ¶ 10,886, on rehearing, 416 F. Supp. 1002 (N.D. Ga. 1976) (two years, seven months).

[16] The Court below expressly found that Occidental received "adequate notice" of the new issues which were not included in the original charge but were raised by the EEOC after its investigation. The Court found that adequate notice was provided because reference was made to those issues in the District Director's Findings of Fact (February 25, 1972) and in the EEOC's Determination of Reasonable Cause (February 8, 1973). Yet backpay liability on all issues raised in the EEOC's lawsuit extends back to March 9, 1969, two years prior to the filing of the original charge. Thus Occidental had accumulated three years of backpay liability on the new issues before receiving notice of those issues. Even so, Occidental's case is a favorable one on the facts for the EEOC, for the one year delay from the filing of the charge to the Findings of Fact is minor delay compared to the EEOC's performance in other cases. See, e.g., cases cited in note 15, *supra*. While the EEOC investigation may in some instances give the employer a general indication of the issues likely to be raised, where the EEOC demands voluminous documents and statistics, the employer has no indication which specific issues are the focus of the investigation until he is notified by the EEOC.

employer is not only unaware of the issues during this time, but is also unaware of which *employees* may be involved in the case, for the EEOC often sues on behalf of a broad class of employees not named in the charge; *e.g.*, in *Occidental* a charge of sex discrimination in maternity policies was expanded to include male employees allegedly victimized by discrimination in administration of the retirement system. Moreover, even where conciliation provides notice of the potential issues, once an aggrieved person has received a determination on his charge and then allowed his right to sue to expire, an employer may receive no notice at all that the EEOC may yet sue him on the same charge several years later.[17] Thus in the EEOC's practice there is no sure repose for an employer once charged with discrimination. There is, rather, perpetual jeopardy.

This Court has recognized the EEOC's record of "significant delays." *Johnson* v. *Railway Express Agency, Inc.*, *supra*, 421 U.S. at 465, n.11. In light of that record Title VII cases brought by the EEOC are often those very cases in which "notice to defend" is absent or inadequate or which "have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." Such factors are the very reasons for a statute of limitations. Their recurrence in EEOC actions under Title VII vividly illustrates the need for a statute of limitations on such EEOC actions. Just as *Moody* held that prejudicial delay in asserting a backpay claim would justify denial of backpay, so also where delay in filing the lawsuit would be prejudicial to defense on the merits, the entire suit should be barred.

[17] See EEOC v. C & D Sportswear Corp., 398 F. Supp. 300 (M.D. Ga. 1975); EEOC v. Christianburg Garment Co., 367 F. Supp. 1067 (W.D. Va. 1974); EEOC v. American Machine & Foundry, Inc., 12 EPD ¶ 11,200 (M.D. Pa. 1976); EEOC v. Moore Group, Inc., 11 EPD ¶ 10,886, on rehearing, 416 F. Supp. 1002 (N.D. Ga. 1976).

As discussed in detail below (pp. 24-26, *infra*), application of a statute of limitations will in no way detract from the salutary deterrent purposes of Title VII. Neither will application of a statute of limitations detract from the "make-whole" purposes of Title VII, for in addition to a timely EEOC lawsuit, the statutory scheme also allows the charging party to pursue his own lawsuit with statutory authorization for appointed counsel [18] and recovery of costs and attorneys' fees.[19] Application of a statute of limitations will simply prevent the litigation of stale claims and at the same time control the unbridled discretion and interminable delays of the EEOC, which result will benefit charging parties, respondent-employers and the public interest.[20] As the court stated in *EEOC* v. *American National Bank*, 420 F. Supp. 181, 184-85 (E.D. Va. 1976):

> Unconscionable delay in proceedings under Title VII not only disserves the policy of ending discrimination while leaving the alleged victim of discrimination without relief, but also the parties charged are left in the Damoclean situation of never knowing when an old charge may spring back into life as the basis of a lawsuit against it [sic]. The proper functioning of administrative agencies and the proper relationship between a government and its citizens, individual and corporate, should not allow the unending possibility of litigation on forgotten matters. [footnote omitted]

[18] § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1).

[19] § 706(k), 42 U.S.C. § 2000e-5(k).

[20] Just as in Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 467, n.13 (1975), it cannot be overemphasized "how little is at stake here." As there, the issue is not whether employers can be compelled to adhere to Title VII, for if they are presently engaged in conduct which violates Title VII, either the charging party or the EEOC itself can file a *new* charge under Title VII. The question in this case is only whether a particular charge has been held so long by the EEOC that its assertion would prejudice a defendant and burden the courts with stale claims.

In the absence of any time limitation whatsoever on EEOC actions under Title VII, there will undoubtedly be cases [21] in which the delay is so unreasonable and the prejudice so extreme that to allow the suit would "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples," *Malinski* v. *New York*, 324 U.S. 401, 417 (1945), and thus constitute a denial of due process of law to the defendant. It is for just such reasons that the absence of any statute of limitations has long been recognized as "utterly repugnant to the genius of our laws." *Adams* v. *Woods*, 6 U.S. (2 Cranch) 336, 342 (1805).

B. *Application Of State Statutes Of Limitations Is Required By The Congressional Policy For Expeditious Action Under Title VII.*

In drafting Title VII Congress clearly contemplated expeditious action to resolve charges of employment discrimination. Title VII contains seven specific time limits [22] on enforcement action, none longer than 180 days. It also contains an express command to the judiciary that Title VII cases are "to be in every way expedited," [23] and a requirement that the EEOC "shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge

[21] Such cases may have already arisen. See notes 10-12, *supra*.

[22] Charges must ordinarily be filed with the EEOC within 180 days after the event; § 706(e): the EEOC must provide notice to the employer within ten days after the charge is filed, § 706(b); mandatory deferral to the authority of an appropriate state agency is required for at least 60 days, § 706(c) and (d), but not more than 300 days, § 706(e); the EEOC may bring an action only upon expiration of 30 days after a charge is filed, § 706(f)(1); the aggrieved person may bring an action if the EEOC has not conciliated, dismissed, or sued upon his charge within 180 days of its filing, § 706(f)(1), but may only do so during a 90 day period.

[23] § 706(f)(5), 42 U.S.C. § 2000e-5(f)(5).

. . . ."[24] It is implausible to argue that with this emphasis on expedition evident throughout the statute Congress intended that the EEOC would be free to delay its filing of lawsuits for as long as six years.[25] Rather, the only inference consistent with this emphasis on expedition is the traditional inference that in the absence of an express federal limitation the appropriate state statute of limitations applies.[26] *Johnson* v. *Railway Express Agency, supra; O'Sullivan* v. *Felix, supra; Auto Workers* v. *Hoosier Cardinal Corp., supra.* This rule is so well established that Congress must be presumed to have been on notice of it. See *Auto Workers* v. *Hoosier Cardinal Corp., supra,* 383 U.S. at 704; *United States* v. *Minker,* 350 U.S. 179, 188 (1956); *United States* v. *Neustadt,* 366 U.S. 696, 707 (1961); *T.I.M.E.* v. *United States,* 359 U.S. 464, 473 (1959). Where Congress gave no indication contrary to this well-established rule, and where its application is consistent with the statutory scheme and purposes, the traditional rule must be applied.

III.

The Ninth Circuit's Reasons For Not Applying State Statutes Of Limitations To Suit By The EEOC Are Not Supported By Law Or Policy.

Ignoring the policies of fairness and repose on which the application of statutes of limitations is based, the

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[24] § 706(b), 42 U.S.C. § 2000e-5(b).

[25] See note 9, *supra.*

[26] Although the applicable state statutes of limitations vary, this variance alone is no reason to render such state statutes inapplicable to federal civil rights actions. Johnson v. Railway Express Agency, 421 U.S. 454, 464. Nor are the one year statutes necesarily "too short" for Title VII purposes. Significantly, Congress itself expressly limited private lawsuits to a 90 day period, which has been strictly applied. International Union of Electrical, Radio & Machine Workers v. Robbins & Myers, Inc., —— U.S. ——, 97 S.Ct. 441 (1976). Of course, Congress remains free to establish a uniform and definite statute of limitations in Title VII.

Court of Appeals in its decision below ruled that suit by the EEOC promotes a "public" interest and therefore is not subject to the same restrictions as apply to the protection of merely "private" rights. The court's distinction between public and private lawsuits was premised (1) on the historic immunity enjoyed by the sovereign when suing to enforce its own rights, and (2) on a comparison of the roles of the EEOC and the National Labor Relations Board (NLRB) in implementing the public policies with which each agency is concerned. We show below in Part A that the Ninth Circuit erroneously failed to recognize that the interests asserted by the EEOC are not of the sort entitled to the sovereign exception, that the analogy to the NLRB is inapposite, and that the court confused the public interest in an effective remedy under Title VII with the public interest in suit being brought at all. Finally, we show in Part B that certain "practical considerations" suggested by the Court of Appeals, rather than supporting its conclusion, confirm the need for application of a limitations period.

A. *The Ninth Circuit Erred In Concluding That EEOC Lawsuits On Behalf Of Private Individuals Are Not Subject To Limitations.*

1. *The Immunity From Limitations Ordinarily Due The Sovereign Is Inapplicable.*

The Ninth Circuit ruled that because suit by the EEOC promotes the public interest in ending discrimination, the EEOC is entitled to the immunity ordinarily due the sovereign when it sues to preserve its own rights. That the government is immune from the limitations defense when it sues to enforce rights vested in it as a sovereign has been, to be sure, often acknowledged by this Court. See, *e.g., United States* v. *Summerlin,* 310 U.S. 414 (1940), and cases cited therein. However, the de-

cisions also recognize that the government often sues, not to assert its own interests, but to assert the interests of private individuals; and in such cases the immunity ordinarily due the sovereign has not been extended. The distinction was expressly noted in *United States* v. *Des Moines Navigation & Railway Co.*, 142 U.S. 510, 538-39 (1892):

> While it is undoubtedly true that when the government is the real party in interest, and is proceeding simply to assert its own rights and recover its own property, there can be no defense on the ground of laches or limitation, *United States* v. *Nashville, C. & St. L. R. Co.*, 118 U.S. 120, 125; *United States* v. *Insley*, 130 U.S. 263; yet it has also been decided that where the United States is only a formal party, and the suit is brought in its name to enforce the rights of individuals, and no interest of the government is involved, the defense of laches and limitation will be sustained as though the government was out of the case, and the litigation was carried on in name, as in fact, for the benefit of private parties. *United States* v. *Beebe*, 127 U.S. 338.

See *United States* v. *American Bell Telephone Co.*, 167 U.S. 224 (1897); *Curtner* v. *United States*, 149 U.S. 662 (1893); *San Pedro & Canon Del Aqua Co.* v. *United States*, 146 U.S. 120, 135 (1892) (". . . it is well settled that when the government has a direct pecuniary interest in the subject matter of the litigation the defenses of stale claim and laches cannot be set up as a bar."); cf. *La Republique Francaise* v. *Saratoga Vichy Spring Co.*, 191 U.S. 427 (1903). In *United States* v. *Beebe*, 127 U.S. 338, 346-47 (1888), this Court demonstrated the sort of inquiry necessary to determine if the government's interest falls within the sovereign privilege:

> [A]n inspection of the record show [sic] that the Government, though in name the complainant, is not the real contestant party to the title or property in

> the land in controversy. It has no interest in the suit, and has nothing to gain from the relief prayed for, and nothing to lose if the relief is denied. The bill itself was filed in the name of the United States, and signed by the attorney-general, on the petition of private individuals; and the right asserted is a private right, which might have been asserted without the intervention of the United States at all.
>
> * * * *
>
> We are of the opinion that when the Government is a mere formal complainant in a suit, not for the purpose of asserting any public interest, title, or property, but merely to form a conduit through whom one private person can conduct litigation against another private person, a court of equity will not be restrained from administering the equities existing between the real parties by any exemption of the Government designed for the protection of the rights of the United States alone. The mere use of its name in a suit for the benefit of a private suitor cannot extend its immunity as a sovereign government to said private suitor, whereby he can avoid and escape the scrutiny of a court of equity into the matters pleaded against him by examining into and deciding the case according to the principles governing courts of equity in like cases between private litigants.

Measurement of the EEOC lawsuit under Section 706 against this standard demonstrates that the government's interest in such a suit is not of the sort required to invoke sovereign immunity from the limitations defense. Suit under Section 706 is not tied to the EEOC's conception of the general public interest, but to a charge filed by an individual. The EEOC has no right to sue under Section 706 independent of the charge filed by a person claiming to be aggrieved.[27] And it has no exclusive right

[27] Sec. 706(f)(1), 42 U.S.C. § 2000e-5(f)(1). *Compare* Section 706 *with* Section 707, 42 U.S.C. § 2000e-6. Unlike Section 706,

to sue on the charge once it is filed, for the statute permits the charging party to sue on his own behalf.[28] If the EEOC does bring suit, it can seek relief no broader than that available to the charging party suing on his own behalf.[29] In fact, the relief available under Title VII is less extensive than that available under the Civil Rights Act of 1866, 42 U.S.C. § 1981, which this Court has already held subject to a state limitations period. *Johnson* v. *Railway Express Agency, supra.* While it may be that the public's interest in the vindication of private rights is generally served by an EEOC suit, just as it is served when any legislative pronouncement is enforced, *Johnson* clearly shows that that interest is not so great as to be immune from the public interest embodied in statutes of limitations. The Ninth Circuit completely ignored the teaching of *Johnson* with the glib statement that "this case involves a public agency enforcing Title VII rights." 535 F.2d at 539. However, just as the United States government in *Beebe* was not the real party in interest to the suit, so too the EEOC in a Title VII action "though in name the complainant, is not the real contestant party. . . ." The EEOC has "nothing to gain from the relief prayed for, and nothing to lose if the relief is denied." Furthermore, the right asserted by the EEOC "is a private right, which might have been asserted without the intervention of the United States at all." Consequently, the "mere use of [the EEOC's] name . . . cannot . . . stop the court from examining into and deciding the case according to the principles governing courts of equity in like cases between private litigants."

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which is keyed entirely to the filing of a charge, Section 707 provides for a "pattern or practice" suit upon certification that the case is of general public importance.

[28] Sec. 706(g), 42 U.S.C. § 2000e-5(g).

The correct understanding of the EEOC's interest in a Section 706 action was evinced by the Court of Appeals for the Fifth Circuit in *EEOC* v. *Griffin Wheel Co.*, 511 F.2d 456, *clarified*, 521 F.2d 223 (5th Cir. 1975). Drawing from its earlier decision in *United States* v. *Georgia Power Co.*, 474 F.2d 906, 923 (5th Cir. 1973), the court quoted:

> Where the government is suing to enforce rights belonging to it, state statutes of limitation are not applicable . . . . However, this principle is not apropos to the present back pay claim. Insofar as the pattern or practice suit constitutes a proper legal conduit for the recovery of sums due individual citizens rather than the treasury, it is a private and not a public action . . . . These personal claims are entitled to no superior status because they are here allowed to be asserted in the Attorney General's suit as well as in the private class action.

511 F.2d at 458-59 (citations omitted).[30] The Fifth Circuit's characterization of the government's interest in a lawsuit under Title VII accords entirely with the concept of public interest expressed in *Beebe* and similar cases. The Ninth Circuit's conclusory rejection of the Fifth Circuit's analysis was therefore clearly in error.

2. *The Comparison To The NLRB Is Inapposite.*

The Ninth Circuit also drew on two decisions under the National Labor Relations Act to show that the

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[30] Altough the issues in *Georgia Power* concerned the application of state statutes of limitation to claims for backpay rather than to the bringing of suit, the same principle is controlling. The backpay claims in *Georgia Power* were raised prior to the effective date of the 1972 amendment that limited an award of backpay to no more than two years prior to the filing of a charge. The Fifth Circuit correctly held that application of the appropriate state statute of limitations (also two years) precluded an award of backpay to individual claimants prior to two years before the government suit was brought.

NLRB, like the EEOC an agency of the federal government, is not bound by statutes of limitations when seeking backpay. *Nabors* v. *NLRB*, 323 F.2d 686 (5th Cir. 1963); *J. H. Rutter-Rex Mfg. Co.* v. *NLRB*, 399 F.2d 356 (5th Cir. 1968), rev'd on other grounds, 396 U.S. 258 (1969). The Court thought this persuasive that the EEOC would similarly be immune from a time bar. The comparison, however, is clearly inapposite. The NLRB is a quasi-judicial body charged with the exclusive responsibility to prevent and redress unfair labor practices, and private individuals have no right independent of the NLRB to sue in court under the NLRA. An order of the NLRB determining liability and an appropriate remedy is judicially enforceable upon limited review by the courts of appeals for substantial evidence.[31]

The EEOC's role under Section 706 is significantly different. Unlike the NLRB, the EEOC does not have exclusive responsibility for the enforcement of Title VII. "The Commission cannot adjudicate claims or impose administrative sanctions. Rather, final responsibility for enforcement of Title VII is vested with federal courts." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). As already noted, the charging party is free any time after 180 days following the filing of the charge to bypass the EEOC's procedures and file an independent suit. If the EEOC does sue, the scope of its suit is limited to the predicate charge and matters reasonably related to it. Charging parties are permitted to intervene in an EEOC suit as of right,[32] "presumably to insure that they are satisfied with the conduct of the litigation to vindicate their rights." *EEOC* v. *Union Oil Co.*, 369 F. Supp. 579, 588 (N.D. Ala. 1974). None of

[31] 29 U.S.C. § 160; see Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. 261 (1940).

[32] Sec. 706(f)(1), 42 U.S.C. § 2000e-5(f)(1).

these restrictions on the authority of the EEOC are consistent with the concept of the public agency asserting a public right vested in it as a public body, as described in *Amalgamated Utility Workers* v. *Consolidated Edison Co. supra*; rather, the procedures the EEOC offers, including agency suit on behalf of the individual, are far more like a private administrative remedy to protect private rights. In fact, Congress deliberately withheld from the EEOC authority comparable to that of the NLRB, thereby evidencing an intent that the "public" authority vested in the former not be as pervasive as is vested in the latter.

Equally important, the delays complained of in both *Nabors* and *Rutter-Rex* occurred *after* the NLRB's determination as to the employer's liability had been confirmed by the Fifth Circuit but before the extent of that liability had been established. The situations in those cases are comparable to a district court's delay in formulating a remedial decree after full trial on the merits. In a district court, however, an employer would have the benefit of numerous procedural safeguards to ensure that the delay does not become too great. But the delay complained of in *Occidental* and *Griffin Wheel* occurred before suit was even brought, *before* the employer could even be fully aware of the scope of the charges that it would eventually have to defend. No procedural requirements exist to protect the employer from these pre-suit delays which accompany EEOC lawsuits.[33]

Thus, even though *Nabors* and *Rutter-Rex* both indicated that statutes of limitation will not apply to the NLRB, neither involved delay in the bringing of the

[33] Several courts have suggested that provisions of the Administrative Procedure Act provide a means by which an employer can protect himself from EEOC lethargy. See, *e.g.*, EEOC v. Moore Group, Inc., 416 F. Supp. 1002 (N.D. Ga. 1976); EEOC v. Metropolitan Atlanta Girls' Club, Inc., 416 F. Supp. 1006 (N.D. Ga. 1976); but see Chromcraft Corp. v. EEOC, 465 F.2d 745 (5th Cir. 1972), See also text at note 37, *infra*.

initial complaint before the ultimate fact-finder and hence neither provides any basis for analogy to the EEOC.

3. *The Ninth Circuit Erroneously Confused The Public Interest Served By An Award Of Backpay With The Public Interest In Suit Being Brought At All.*

In its opinion below, the court of appeals relied on this Court's decisions in *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976), and *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), to show that suit under Title VII promoted a public interest sufficient to justify not applying the state statute of limitations. But the public interest that this Court found in *Moody* to be sufficient to permit an award of backpay despite a lack of bad faith on the part of the employer in no way addresses the issue whether the lawsuit was properly brought in the first place. The holding in *Moody* was specific: "[*G*]*iven a finding of unlawful discrimination*, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." 422 U.S. at 421 (emphasis added). *Franks* was similarly concerned solely with the extent of remedial relief available once a determination of liability has been made.

Nevertheless, the Court of Appeals herein placed substantial emphasis on the prophylactic purpose of Title VII and the deterrent effect established by the prospect of backpay liability. Such emphasis on the deterrent effect of backpay is misplaced, however, for the deterrent effect of the remedy is unaffected by a requirement that suit be brought in a timely fashion.[34] Indeed, *Moody* ex-

[34] While it may well be that the longer the EEOC delays in bringing suit, the greater the deterrent effect of "the reasonably certain prospect of a backpay award," Albemarle Paper Co. v. Moody, *supra*, 422 U.S. at 417, this Court surely did not mean to suggest that such delays actually serve the statutory purposes of the Civil Rights Act.

pressly held that relief for a violation of Title VII could be denied where "a *particular* cause has been prosecuted in an eccentric fashion, prejudicial to the other party . . ." 422 U.S. at 424. Not only does denial of relief in such circumstances "not offend the broad purposes of Title VII," but "[o]n these issues of procedural regularity and prejudice, the 'broad aims of Title VII' provide no ready solution." 422 U.S. at 424-25. Manifestly then, *Moody* recognized the applicability in a Title VII action of precisely the sort of considerations that underlie the judicial adoption of state statutes of limitations. On the other hand, none of the considerations evaluated in *Moody* or the NLRA cases cited by the Ninth Circuit support the notion that public policy requires the government's right to sue to last indefinitely. Rather, as demonstrated in Part II, *supra*, the public interest requires that government lawsuits on behalf of private individuals be subject to the same standards of fairness as are imposed on private suits seeking the same relief.

Because the interests served by application of a limitations period do not vary with the nature of the relief sought, there is no justification for distinguishing between injunctive and backpay relief in applying statutes of limitations. See *United States* v. *Georgia Power Co.*, *supra*, 474 F.2d at 922-24; *EEOC* v. *Griffin Wheel Co.* *supra*, 511 F.2d at 459. Unreasonable delay in bringing a suit prejudices an employer's ability to defend on the merits whatever the remedy. To the extent it might be thought less prejudicial to simply enjoin an employer from further unlawful practices than to award backpay, there is nevertheless no reason to do so on the basis of a stale charge. An employer who is presently discriminating may be the subject of a fresh charge by an indi-

vidual or by a member of the Commission itself. Such a practice represents a wholly satisfactory accommodation of the interests embodied in both Title VII *and* statutes of limitations.

The error of the Ninth Circuit below is thus plain: it confused the public interest in an effective *remedy* for employment discrimination with the equally strong public interest in having the lawsuit timely brought, so that the outcome of the litigation is determined on the merits, rather than the advantage that accrues to a plaintiff as time diminishes the defendant's ability to defend. As *Moody* evidences, consideration of the interests served by statutes of limitations is entirely appropriate in Title VII suits. Consequently, there is no legally sound reason that the normal rule requiring application of state statutes of limitations should not apply.

B. *The Practical Considerations Offered By The Ninth Circuit Do Not Support Rejection Of The Application Of State Statutes Of Limitations.*

At the close of its discussion of the limitations issue, the Court of Appeals below offered four "practical considerations" in support of its conclusion that state statutes do not apply to EEOC lawsuits. 535 F.2d at 540. None of those considerations withstands analysis, however. The court first suggested that application of often short limitations periods "would frustrate [the EEOC's] attempts to resolve disputes by means of administrative 'conference, conciliation, and persuasion.'" In fact, just the opposite is true. Under the current practice, an employer can be confident that, even if investigation by the EEOC reveals a violation of the statute, it will still be years before the EEOC brings a suit, if at all. This hardly encourages efforts to voluntarily correct the unlawful practices. The specter of a prompt investigation

and suit, on the other hand, provides a strong incentive to the employer to reach an amicable solution.[35]

The court also noted that "it would be cumbersome to determine the applicability of state limitations statutes according to the type of relief sought," referring to the possible separate treatment of backpay and injunctive claims. As already noted, however, the question whether the maintenance of a lawsuit on stale claims should be condoned does not turn on the nature of the relief sought. Where a legislative body has made a policy determination that suit after the passage of a certain number of years prejudices the defendant and disserves the public interest in the repose of claims, it is manifestly not unreasonable to reject the claims, whether for backpay or an injunction, since either would require a lawsuit the maintenance of which has been legislatively disapproved.

The court next stated that because backpay liability will not accrue from a date more than two years prior to the filing of a charge, "an employer need not produce past employment records except for the period of time the charge is pending, and the preceding two years." This is not only incorrect, it also demonstrates that the court completely misconceived the dilemma to the employer created by the court's ruling. The statutory limit on backpay liability is irrelevant to the keeping of business records necessary to prove or disprove the claim of discrimination itself. Moreover, the "period of time the charge is pending" may be many years,[36] requiring the employer to keep records for eight or more years solely for backpay purposes. But more important, the employer

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[35] That this is what Congress intended is further evidenced by the statutory provision permitting the court, in its discretion, to stay the lawsuit after it is filed for a period of sixty days pending further efforts by the EEOC to obtain voluntary compliance. Sec. 706(f)(1), 42 U.S.C. § 2000e-5(f)(1).

[36] See cases cited in notes 9-15, *supra*.

in many cases does not know until suit is finally brought precisely what records will be relevant. Because the scope of the lawsuit is tied to the scope of the investigation, not the charge, the employer cannot know until the determination is issued what the scope of eventual lawsuit may be, and this may itself occur long after relevant records have been lost.

Finally, the Court of Appeals suggested two factors that would operate "to minimize EEOC dalliance"; however, it is clear that neither provides an adequate substitute for application of limitations period. The court first suggested that "the charging party may demand a right to sue letter should the EEOC fail to obtain voluntary compliance or to sue within 180 days of the original filing." This is, of course, completely irrelevant. It is precisely the situation where no suit has been filed by anyone that gives rise to the need for application of a limitations period. Further, it has been the EEOC's practice not to inform the charging party of his right to sue until *after* it has determined that it will not bring suit, see EEOC Compliance Manual § 66.6, rather than immediately following further conciliation. It will be rare for a charging party to be sufficiently informed of his options for this possibility to provide the employer with any "protection" whatsoever. Finally, some courts have held that the EEOC may sue on the same charge that has already been the subject of an individual suit, reasoning that the statute protects only against simultaneous proceedings.

The court also suggested that "in extreme cases a federal district court could compel agency action" under the Administrative Procedure Act.[37] But the issue here is the bringing of a lawsuit, and it is extremely dubious to suggest that a court can order a government agency

[37] Sec. 6(a) and 10(e); 5 U.S.C. §§ 555 (b) and 706(1).

to institute such a legal proceeding. Moreover, it is absurd to put the employer in the position of having to go to court to compel the agency to bring suit against it.

Thus, the "practical considerations" offered by the Ninth Circuit are far more persuasive of the need for application of a limitations period than they are of its superfluity. They offer no justification at all for rejecting the general rule requiring a limitations period.

IV.

The Equitable Doctrine Of Laches Also Applies To EEOC Lawsuits.

Although the issue whether laches will apply to the EEOC was not raised below and therefore is not directly before the Court, full consideration of the questions that were presented requires that some brief comment on the role of laches be made. As many of the cases cited above (pp. 17-21) indicate, the same considerations that mandate application of state statutes of limitations to suit by the government also mandate application of the equitable doctrine of laches. *E.g.*, *United States* v. *Des Moines Navigation & Railway Co.*, 142 U.S. 510 (1892). It is equally clear, however, that even if the statute of limitations does not apply, laches may require dismissal of an EEOC suit.[38] In order to establish laches the defendant must show (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense. *Costello* v. *United States*, 365 U.S. 265, 282 (1961). This Court has already recognized that backpay can be denied to a private party where the suit was prosecuted in a manner that prejudiced the defendant. Such a result

[38] See EEOC v. Griffin Wheel Co., 511 F.2d 456, clarified, 511 F.2d 223 (5th Cir. 1975); United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973).

"does not offend the broad purposes of Title VII." *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 424. "On these issues of procedural regularity and prejudice, the 'broad aims of Title VII' provide no ready solution." *Id.*, at 425. The application of traditional equitable principles in such a situation not only does not conflict with Title VII, it provides the missing "solution" to the judicial problem.

It should not matter that in *Moody* the plaintiff was a private individual, rather than the EEOC, suing on behalf of the class. If it is determined that the defendant has been prejudiced by the plaintiff's unreasonable delay, no public interest is served if that prejudice is ignored when the plaintiff happens to be the government. And just as the prejudicial conduct of the litigation may justify denial of backpay relief, so too prejudicial conduct prior to the litigation should bar the lawsuit entirely. If that prejudice is in the form of a diminished ability to defend the charges on the merits due to the plaintiff's unreasonable delay, there is no less reason to bar the suit entirely if the plaintiff is the government than if the plaintiff is a private individual. The finding of prejudice compels the conclusion that the lawsuit will be unfair to the defendant.[39]

The application of laches will in no way interfere with the EEOC's responsibilities under Title VII. Laches will bar a suit only when the defendant demonstrates that the EEOC's delay or other conduct has so impaired his ability to present a defense that any resulting verdict will necessarily be tainted. The public interest in ending employment discrimination does not extend so far as to justifying finding violations by default.

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[39] See EEOC v. American National Bank, 420 F. Supp. 181 (E.D. Va. 1976); EEOC v. American Machine & Foundry, Inc., 12 EPD ¶ 11,200 (M.D. Pa. 1976); EEOC v. Moore Group, Inc., 11 EPD ¶ 10,886, on rehearing, 416 F. Supp. 1002 (N.D. Ga. 1976); EEOC v. C & D Sportswear Corp., 398 F. Supp. 300 (M.D. Ga. 1975).

Thus, application of the laches doctrine to suit by the EEOC under Title VII will disserve no legitimate public interest, but will in fact ensure that cases are tried on the merits rather than on unfair advantage. Accordingly, this Court should consider the laches doctrine as an integral part of the analysis here, and should conclude, for the reasons stated above, that laches is an applicable defense under Title VII.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-99

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Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS—Continued

TABLE OF CITATIONS—Continued

TABLE OF CITATIONS—Continued

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INTEREST OF THE AMICUS[1]

The Chamber of Commerce of the United States of America [hereinafter "the Chamber"] is a federation consisting of a membership of over thirty-six hundred (3,600) state and local chambers of commerce and professional and trade associations, and a direct business

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[1] Written consent of the parties to the filing of this brief has been obtained as required by Supreme Court Rule 42(2).

membership in excess of sixty thousand one hundred (60,100). It is the largest association of business and professional organizations in the United States.

In order to represent its members' views on questions of importance to their vital interests and to render such assistance as it can to this Court's deliberations in such areas, the Chamber has frequently participated as *amicus curiae* in a wide range of significant fair employment matters before this Court. *E.g.*, *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975); *Geduldig* v. *Aiello*, 417 U.S. 484 (1974); *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

The central issue in this case, whether the authority of the Equal Employment Opportunity Commission [hereinafter the "EEOC"] to file suit in the federal district courts pursuant to Section 706(f)(1) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e-5(f)(1), is subject to any limitation period, is of major interest to the Chamber's membership. At the present time the EEOC has a backlog of approximately 100,000 charges of employment discrimination.[2] Pursuant to Section 706(f)(1), each of these many charges has the potential to be turned by EEOC into a civil action in federal district court seeking injunctive and monetary relief on behalf of the charging parties. If the decision of the Ninth Circuit below is affirmed, the EEOC will be sanctioned to bring to federal court these cases based on charges regardless of how many years prior to suit the charge was filed. Accordingly, the very real possibility exists that in such cases respondent employers will be prejudiced in their defense against these stale claims by the unavailability of witnesses or their loss of memory,

[2] *Daily Labor Report*, No. 167, pp. AA-1 (August 26, 1976), Bureau of National Affairs.

and by the loss or destruction of relevant evidence. Moreover, affirmance of the decision below would seriously impair the right of both charging parties and respondent employers to obtain the efficient and expedious resolution of charges of employment discrimination to which they are entitled.

Because of the vital and legitimate interest of its members in obtaining the prompt and efficient disposition of employment discrimination charges which may be filed against them, the Chamber respectfully submits the following brief as *amicus curiae*.

SUMMARY OF THE ARGUMENT

In 1972 Congress amended Title VII in an effort to enable the EEOC to more effectively enforce the Act. The situation presented to Congress was that EEOC was experiencing 18-24 month delays in the disposition of charges of employment discrimination. Congress clearly felt that such delays were unacceptable. In order to eliminate such delays, Congress provided EEOC with the right to sue by authority of Section 706(f)(1) of the Act. The legislative history relevant to the adoption of Section 706(f)(1) strongly suggests that the 180 day provision therein was intended to serve as a limitation period on EEOC's right to sue. This conclusion draws additional support from other provisions of the 1972 Amendments which demonstrate that the intent of Congress was to dramatically expedite the disposition of charges of employment discrimination.

If this Court should conclude that the 180 day provision in Section 706(f)(1) does not serve as a limitation period on EEOC's right to sue, previous decisions of this Court dictate that EEOC's right to sue should be subject to application of the most analogous state statute of limitation period. Proper consideration of the Congressional intent in providing EEOC with court en-

forcement power and the fundamental principle of due process justify the application of state limitation periods to EEOC's right to sue. Application of state limitation periods to the EEOC's right to sue is not barred by its status as an agency of the United States or the fact that suits brought by it pursuant to Section 706(f)(1) can be said to be within the general public interest. This Court's decisions support the conclusion that state limitation periods are applicable to a suit by the United States or its agencies on behalf of private individuals even where the action of the United States is in the public interest, if the private individuals could have obtained a determination of their rights without the assistance of the United States.

ARGUMENT

I.

SECTION 706(f)(1) OF TITLE VII IMPOSES A 180 DAY LIMITATION PERIOD ON THE EEOC'S RIGHT TO SUE

In 1972 Congress amended Title VII of the Civil Rights Act of 1964[3] by passage of the Equal Employment Opportunity Act of 1972.[4] The most important change which the 1972 Amendments worked on Title VII was to grant the EEOC the power to file an action in federal district court to seek the elimination of alleged unlawful employment practices where its informal methods of conference, cociliation, and persuasion had been unsuccessful in achieving a resolution satisfactory to the EEOC. This grant of authority to EEOC is set forth in Section 706(f)(1) of Title VII which provides in pertinent part as follows:

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[3] 42 U.S.C. § 2000e *et seq.* (1964).

[4] Pub. L. No. 92-261, 86 Stat. 103 (1972).

> If within thirty days after a charge is filed with the Commission . . . the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against [the] respondent . . . *if within one hundred and eighty days from the filing of such charge . . . the Commission has not filed a civil action under the Section, the Commission . . . shall so notify the person aggrieved* and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge . . . by any person aggrieved by the alleged unlawful employment practice. . . . Upon timely application the Court may, in its discretion, permit the Commission . . . to intervene in such civil action upon certification that the case is of general public importance. (Emphasis added).

The Chamber urges this Court that proper analysis of the legislative history surrounding the passage of the 1972 Amendments to Section 706(f)(1) and the clear purpose of certain other of those Amendments require the conclusion that Congress intended the 180 day provision italicized above to serve as a limitation period on the EEOC's right to file suit.[5]

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[5] The Chamber is constrained to acknowledge that six circuit courts of appeals which have had the opportunity to pass on the question of whether the 180 day provision imposes a limitation period on the EEOC's right to sue have concluded that it does not. *Equal Employment Opportunity Comm'n* v. *Duval Corp.*, 528 F.2d 945 (10th Cir. 1976); *Equal Employment Opportunity Comm'n* v. *Meyer Bros. Drug Co.*, 521 F.2d 1364 (8th Cir. 1975); *Equal Employment Opportunity Comm'n* v. *E. I. du Pont de Nemours and Co.*, 516 F.2d 1297 (3rd Cir. 1975); *Equal Employment Opportunity Comm'n* v. *Kimberly-Clark Corp.*, 511 F.2d 1352 (6th Cir. 1975); *Equal Employment Opportunity Comm'n* v. *Louisville and Nashville R.R.*, 505 F.2d 610 (5th Cir. 1974); *Equal Employment Opportunity Comm'n* v. *Cleveland Mills*, 502 F.2d 153 (4th Cir. 1974). The Chamber is confident, however, that this Court's independant review of this issue will result in a contrary exercise of judicial reasoning.

A. The Relevant Legislative History

The 1972 Amendments to Title VII authorizing EEOC to file suit to eliminate alleged employment discrimination were the result of the conclusion of Congress that conciliation powers alone were not sufficient to enable EEOC to effectively enforce the Act.[6] While there was general agreement in Congress that EEOC should be given enforcement powers, a major difference of opinion arose in both Houses of Congress as to what form those enforcement powers should take.[7] On the one side of the issue were those Congressmen who favored conferring on the EEOC "cease and desist" authority like that possessed by the National Labor Relations Board and certain other federal agencies. On the other side of the issue were those Congresmen who were of the opinion that the most effective enforcment of the substantive provisions of Title VII could be achieved by granting the EEOC the right to sue in federal district court. The principle basis of disagreement between the proponents of the differing methods of enforcement was which approach would be more effective and most expeditious.

The situation presented to Congress was that the EEOC had an enormous backlog of charges on which it was taking an average of 18 to 24 months to complete action.[8] Congress was appalled by this excessive delay in processing cases. As Senator Dominick expressed it:

> I do not care who it may be, or how long they may have been claiming discrimination, if they have

[6] H.R. Rep. No. 92-238, 92d Cong., 1st Sess. (1971); U.S. Code Cong. & Admin. News, p. 2139 (1972).

[7] H.R. Rep. No. 92-238 (Minority Views on H.R. 1746), 92d Cong., 1st Sess. (1971); U.S. Code Cong. & Admin. News, p. 2168 (1972); S. Rep. No. 92-415, 92d Cong., 1st Sess. (1971).

[8] This was the testimony of EEOC Chairman Brown in April, 1971, before the House Committee on Appropriations. U.S. Code Cong. & Admin. News, p. 2170 (1972).

> to wait 20 months before they can even find out whether or not the Commission feels that the charge is valid all that one can say is that justice delayed is justice denied.

118 Cong. Rec. 593 (January 20, 1972).

The supporters of court enforcement power for the EEOC viewed that approach as the only viable method for reducing the considerable delay in processing charges. As it was expressed by proponents of court enforcement in the House, it was feared that granting EEOC cease and desist authority would merely add to the already excessive delay rather than reduce it:

> A close examination of the time factors involved in processing charges before the National Labor Relations Board (which was the model for formulating the enforcement powers given to the EEOC by the Committee bill) and the district courts exclusively establishes that quicker relief can be achieved when the district court approach is utilized.
>
> * * * *
>
> [I]t can easily take 2 and 1/2 years from the time a worker walks into a regional Labor Board office with a charge that he has been discharged illegally until the time a court of appeals finally issues an order that he be reinstated to his job with back pay.
>
> * * * *
>
> When the time factors are added up, the 18-24 month backlog currently existing at EEOC, the time needed for an administrative proceeding and review by the Commission, plus the 630 day figure currently required to get court enforcement (using the NLRB figure), *3 and 1/2 to 4 years would appear to be a more correct approximation of the time involved in getting enforcement through the administrative cease and desist approach.*
>
> * * * *

> In striking contrast, . . . ten months was the median time interval from issue to trial for non-jury trials completed in United States District Courts in 1970. . . . (Emphasis added).

H.R. Rep. 92-238, 92nd Cong., 1st Sess. (1971) (Minority Views on H.R. 1746); U.S. Code Cong. & Admin. News, p. 2169 (1972).

Similar concern was subsequently expressed by Senator Dominick and other senators who favored court enforcement power for the EEOC:

> Consider these facts. I referred to them yesterday and they are worthwhile repeating today. Chairman Brown of the EEOC testified that as of June 30, 1971, the Commission had a backlog of 32,000 cases. The EEOC anticipated a caseload of 32,000 new cases in fiscal year 1972 and 45,000 in fiscal year 1973. As of February 1971—the most recent data we have been able to get—the EEOC complaints required 18 to 24 months for disposition.
>
> * * * *
>
> To this already substantial backlog one must add the impact of the more complex and time consuming cease-and-desist procedure. . . .
>
> * * * *
>
> If Court enforcement is adopted the district courts will be faced with the same expanded caseload, but they are substantially better adapted to cope with the increase. . . .
>
> * * * *
>
> Whereas the EEOC backlog is from 18 to 24 months, the *median time interval from issue to trial in U.S. district court in 1970 according to the annual report of the Director of the Administrative Office of the U.S. Courts was 10 months.* (Emphasis added).

118 Cong. Rec. 697 (January 21, 1972).[9]

The proponents of cease and desist authority for EEOC were equally unsatisfied with EEOC's 18-24 month delays in the processing of charges. They doubted, however, that the universally desired expeditious resolution of charges could be achieved through court enforcement.[10]

Thus, although the supporters of cease and desist authority and court enforcement power disagreed as to which enforcement approach would be most efficient and expeditious, it is clear they were in agreement that something had to be done to reduce EEOC's excessive delays in handling cases. When considered against this prevailing mood in the Congress at the time of the passage of the 1972 Amendments, there can be no doubt that Congress intended that the court enforcement powers which were given to EEOC in Section 706(f)(1) would be effectively and expeditiously utilized. Rather than affording EEOC a right to sue which was interminable, it is evident the Congress meant for EEOC to exercise its newly gained suit powers within a limited time.

The limitation period which Congress imposed on EEOC's right to sue is marked by the expiration of the 180 day period set forth in Section 706(f)(1). This conclusion is supported by review of certain statements made by Senators Dominick and Javits, leaders on opposite sides of the court enforcement issue, in which it was acknowledged that the court enforcement proposal provided an express limitation on the EEOC's right to sue.

On February 7, 1972, Senator Dominick stated with regard to the court enforcement proposal that:

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[9] *See also* 118 Cong. Rec. 699-700 (Remarks of Senator Fannin); 118 Cong. Rec. 732 (Remarks of Senator Brock); 118 Cong. Rec. 944 (Remarks of Senator Talmadge).

[10] 118 Cong. Rec. 941-42 (Remarks of Senator Williams).

> The Amendment contains several cosmetic differences from the original Amendment *as well as one substantial change which reduces the time period within which the Commission may file a civil action against the respondent* from 180 days to 150 days from the time the Commission first issues its formal charge. (Emphasis added).

118 Cong. Rec. 1307 (February 7, 1972). Approximately one week later, Senator Javits, discussing another enforcement proposal which contained a similar time sequence commented:

> Let us understand that we are dealing with a period of approximately 150 days, *that this is the allowable time* for the Commission to move into a given situation. The first thirty days represent an effort to conciliate, making a total of six months. So that is the Commission operation. *At the end of six months it becomes plenary.* (Emphasis added).

118 Cong. Rec. 1800 (February 15, 1972). Significantly these explanations of the import of the 180 day provision which was contained in the final version of Section 706(f)(1) were never challenged as erroneous.

The explicit explanations of the purpose of the 180 day provision in the court enforcement proposal provided by Senators Dominick and Javits are not clouded, as some have claimed, by an earlier exchange between these senators concerning whether the Amendments should provide that the EEOC "shall" or "may" file suit after thirty days.[11] That discussion arose as a result of an amendment Senator Javits introduced to Senator Dominick's court enforcement proposal which would have revised that proposal to provide that the EEOC "shall" bring suit within thirty days after a charge was filed. Senator Dominick objected to this requirement, in that

[11] 118 Cong. Rec. 1068 (January 25, 1972).

he felt it did not afford EEOC sufficient time to attempt to secure a voluntary conciliation agreement.[12]

Senator Javits explained that he offered his amendment in an attempt to conform Senator Dominick's court enforcement proposal to the original Senate bill granting EEOC cease and desist authority which required the EEOC to initiate that enforcement procedure by issuing a complaint if it could not obtain voluntary compliance.[13]

While Senator Javits was willing to agree to replace "shall" with "may", he pointed out that:

> [I]f we change the word "shall" to "may", *do we not have to have some cut off time as far as the Commission is concerned*, with respect to its exercise of that discretion in bringing a civil action. . . . (Emphasis added).

118 Cong. Rec. 1069 (January 25, 1972). In response, Senator Dominick agreed that a "cut off time" was necessary as to the EEOC's right to sue, but expressed his concern that it not be made shorter than the 180 day period already provided for in his proposal:

> We can shorten the 180-day private filing restriction as far as I am concerned, but I think we should keep in mind that this is a Commission which has been appointed for the purpose of trying to solve any employment discrimination that there might be, and consequently, I do not think we should assume

[12] "Without trying to be too technical or difficult about it, I believe that 'shall' defeats the purpose of the 30-day delay which was simply designed to try to get, as they say in the delivery business, 'a burr under the tail' of the parties. But I do not see why we should require them within thirty days to bring suit. They might be able to accomplish voluntary compliance within forty days, or it might take thirty-two days, but under the language of this amendment what happens if they do not file suit within thirty days? Then what do we do?" 118 Cong. Rec. 1068 (January 25, 1972) (Remarks of Senator Dominick).

[13] 118 Cong. Rec. 1069 (January 25, 1972).

> that they will not take action where there is a clear case. Problems will arise where there are grey areas, or where they are not sure whether they have substantial evidence to support a case. Under those circumstances, it would seem to me that we should give them more time. If we want to say 90 days from the filing of such a charge, or on the expiration of any period, instead of 180 or 120, that is all right with me. If the Senator would do that, then we are changing the time table which the Committee has already worked out in the process of trying to determine what should be done with enforcement procedures.

118 Cong. Rec. 1069 (January 25, 1972).

Despite Senator Dominick's choice of the words "private filing restriction" to identify the 180 day period, it is clear that by his statement he meant to point out to Senator Javits that this time period satisfied the Senator's concern that the Amendments contain a "cut off time" on EEOC's right to sue. Accordingly, rather than cloud their subsequent clear statements to the effect that EEOC's rights to sue power was to be limited to 180 days, *supra* p. 10, their discussion of January 25, 1972, demonstrates that they were both keenly aware of the necessity for and the existence of a definite limitation period on the EEOC's right to sue.

The Chamber submits that the foregoing review of the legislative history relevant to Section 706(f)(1) strongly suggests that Congress intended the 180 day provision therein to serve as a federal statute of limitation to EEOC's right to sue.

B. Other Relevant Provisions of the Amendments

Additional support for the conclusion that Congress intended the 180 day provision in Section 706(f)(1) to serve as a limitation period on the EEOC's right to sue can be drawn from certain of the other changes that it

made to Title VII by the 1972 Amendments in order to expedite the disposition of charges. For instance, despite its obvious awareness at the time of passage of the Amendments that it was not uncommon for EEOC to require a year or more to make a determination of "reasonable cause" with respect to a charge, Congress provided in Section 706(b) of the Act that:

> The Commission shall make its determination of reasonable cause as promptly as possible and, so far as practicable, *not later than 120 days from the filing of the charge*. . . . (Emphasis added).

42 U.S.C. § 2000e-5(b).

The determination of Congress that EEOC should henceforth complete its "reasonable cause" determination process within a time frame that bore no relation to its then existing practices effectively serves to nullify the assertion that in view of its knowledge of EEOC's backlog of cases, Congress can not be presumed to have limited EEOC's right to sue to 180 days. As is evident from the legislative history of the 1972 Amendments, Congress believed that significant changes were necessary in EEOC's case handling procedures if elimination of excessive delays in resolving charges was to be accomplished.

As was expressed by Senator Brock during the Senate's consideration of court enforcement powers for the EEOC.

> The present EEOC complaint disposition requires 18 to 24 months. . . . *In restructuring Government agencies such as the EEOC it is incumbent upon Congress to show some imagination to fashion procedures that will provide for a speedy resolution of business.* (Emphasis added).

118 Cong. Rec. 732 (January 21, 1972).

Congress clearly accepted this challenge to demonstrate some imagination by specifying that reasonable cause

determinations should normally be made within 120 days from the filing of a charge. Plainly no purpose would be served in exhorting the EEOC to reach a reasonable cause determination within 120 days if the EEOC was not required to act on that determination within a reasonable time frame, such as within the next 60 days for a total of 180 days from the filing of the charge. In view of the action of Congress with regard to expediting the "reasonable cause" determination process, it is illogical to presume that Congress did not similarly intend some limitation on the time within which EEOC had to decide whether to file an action on a charge.

Other provisions of the Amendments which point strongly to the conclusion that Congress intended that EEOC should exercise its right to sue within 180 days are Sections 706(f)(4) and (5), 42 U.S.C. § 2000e-5(f)(4) and (5). These provisions address the duties of the federal district courts in handling cases brought pursuant to Section 706(f)(1). In pertinent part they provide that:

> (4) It shall be the duty of the chief judge of the district . . . immediately to designate a judge in each district to hear and determine the case. . . .

and,

> (5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

The unmistakable command of these provisions is that Title VII cases are to receive the most expedious handling possible in the federal district courts so that claimants may receive a speedy determination of their rights. This expedited procedure in the federal courts would appear to be fruitless, however, unless Congress intended EEOC to be constrained to speedily determine, within

180 days, those charges which it should pursue in the district courts. For if, as it claims, the EEOC is entitled to an interminable time within which to exercise its right to sue, precious little is gained by having the federal courts afford cases brought by EEOC expedited handling. It is obvious, therefore, that the intended purpose of the above provisions is only accomplished if the EEOC is likewise required to act speedily by exercising its right to sue within 180 days.

In view of the undeniable congressional objective to expedite the disposition of charges under Title VII, as is evidenced by the provisions discussed above and the previously discussed legislative history relevant to the adoption of Section 706(f)(1), it should appropriately be determined that Congress fully intended the 180 day provision found in Section 706(f)(1) to serve as a limitation period on EEOC's right to sue.

II.

IF SECTION 706(f)(1) IS FOUND NOT TO STATUTORILY LIMIT THE EEOC'S RIGHT TO SUE TO 180 DAYS, THE MOST ANALOGOUS STATE STATUTE OF LIMITATION PERIOD IS APPLICABLE

Should the Court determine that Section 706(f)(1) of Title VII does not provide a limitation on the EEOC's right to sue beyond 180 days after the filing of a charge of employment discrimination, it does not follow that the Court should conclude that the EEOC's right to sue is interminable. Congress has enacted many federal rights of action without providing a limitation period on their enforcement and this Court has uniformly held with respect to such rights of action that they should be governed by the most analogous statute of limitations provided by the applicable state law:

> *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975) (Civil Rights Act of 1870);

Autoworkers v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 701-705 (1966) (Labor Management Relations Act);

Cope v. *Anderson*, 331 U.S. 461, 463 (1947) (National Bank Act);

O'Sullivan v. *Felix*, 233 U.S. 318, 322-324 (1914) (Civil Rights Act of 1871);

Chattanooga Foundry Co. v. *Atlanta*, 203 U.S. 390, 397 (1906) (Sherman Antitrust Act);[14]

Campbell v. *Haverhill*, 155 U.S. 610, 613-618 (1895) (Patent Act).

This Court's lead in applying state statutes of limtation to federally created rights of action without an applicable federal limitation period has, in turn, been followed by the lower federal courts on numerous occasions:

Equal Employment Opportunity Comm'n v. *Griffin Wheel Co.*, 511 F.2d 456, 458-459 (5th Cir. 1975);

United States v. *Georgia Power Co.*, 474 F.2d 906. 923 (5th Cir. 1973) (Civil Rights Act of 1964);

Englander Motors Inc. v. *Ford Motor Co.*, 293 F.2d 802, 804 (6th Cir. 1961) (Clayton Antitrust Act);

Bufalino v. *Michigan Bell Telephone Co.*, 404 F.2d 1023, 1028 (6th Cir. 1968), *cert. denied*, 394 U.S. 987 (1969) (Communications Act of 1934);

Esplin v. *Hirschi*, 402 F.2d 94, 101 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969) (Investment Company Act of 1940);

Sewell v. *Grand Lodge of Inter. Ass'n of Machinists and Aerospace Workers*, 445 F.2d 545, 548-549 (5th Cir. 1971), *cert. denied*, 404 U.S. 1024 (1972) (Labor Management Reporting and Disclosure Act of 1959);

[14] In 1955, Congress enacted a federal statute of limitations applicable to suits under the antitrust laws. 15 U.S.C. Sections 15(b) and 16.

Jones v. *Trans World Airlines, Inc.*, 495 F.2d 790, 799 (2nd Cir. 1974) (Railway Labor Act);

Richardson v. *MacArthur*, 451 F.2d 35, 39 (10th Cir. 1971);

Douglass v. *Glen E. Hinton Investments, Inc.*, 440 F.2d 912, 914 (9th Cir. 1971);

Klein v. *Bower*, 421 F.2d 338, 343 (2nd Cir. 1970);

Morgan v. *Koch*, 419 F.2d 993, 996-997 (7th Cir. 1969) (Securities Exchange Act of 1934).

A. Ample Justification Exists For Subjecting EEOC's Right to Sue to the Most Analogous State Limitation Period.

Barring a determination that EEOC's right to sue pursuant to Section 706(f)(1) is limited to 180 days, proper consideration of the intent of Congress in granting the EEOC court enforcement power and of the fundamental principle of due process dictate the addition of EEOC's right to sue to the list of federal rights of action which are governed by the most analogous state limitation period.

The debates leading up to the grant of court enforcement power to the EEOC indicate that it was the intent of Congress that this grant would result in the expeditious disposition of discrimination charges to the mutual benefit of both charging parties and respondent employers:

> Mr. Chairman, I urge support of the Erlenborn-Mazzoli substitute which would give the Commission the right to go into court, resulting in fairness to both parties and expeditious, judicial and fair relief. [117 Cong. Rec. 32100 (September 16, 1971) (Remarks of Congressman Erlenborn)].

* * * *

This Amendment protects the rights of both respondents and aggrieved by providing a fair, effective and expeditious resolution of the dispute. [118 Cong. Rec. 698 (January 21, 1972) (Remarks of Senator Dominick)].

* * * *

As I pointed out effective protection of the rights of both the employer and the employee demand a speedy resolution of the dispute. [118 Cong. Rec. 699 (January 21, 1972) (Remarks of Senator Dominick)].

* * * *

[C]ourt enforcement offers a more expeditious settlement and a speedy resolution is vitally important to both an aggrieved employee and to a respondent employer. [118 Cong. Rec. 699 (January 21, 1972) (Remarks of Senator Fannin)].

* * * *

Court enforcement is speedier and provides greater protection for both plaintiffs and defendant than does administrative enforcement. [118 Cong. Rec. 943 (January 24, 1972) (Remarks of Senator Talmadge)].

It is evident from the overriding concern of Congress that the disposition of charges be expedited that it did not intend that EEOC's resort to court enforcement would be preceded by excessive delay at the administrative level:

> I do not feel that it is fair for the government agencies to keep either respondents or complainants waiting years before matters in which they are vitally interested in are disposed. [118 Cong. Rec. 732 (January 21, 1972) (Remarks of Senator Brock)].

To the contrary, so that EEOC's court enforcement would have the desired effect or the enforcement of Title VII, it was contemplated that EEOC would exercise this power swiftly:

> The *imminence of court action* coupled with the threat of adverse publicity and immediately enforceable orders will serve as a powerful inducement to voluntary settlements [118 Cong. Rec. 927 (January 24, 1972) (Remarks of Senator Dominick) (emphasis added)].

Faced with this evident concern that prompt action be taken on charges of employment discrimination, it cannot be lightly presumed that Congress intended EEOC's right to sue on a charge to be interminable. Rather, absent a federal limitation period, it is more reasonable to assume that Congress intended that EEOC's right to sue would be limited by state statutes of limitation. Hill, *State Procedural Law in Federal Non-Diversity Litigation*, 69 Harv. L. Rev. 66, 78-81, 91-92 (1955).

Application to the EEOC's right to sue of the most analogous state limitation periods is further justified by due process considerations as well as the need for judicial economy. As this Court has often recognized, the application of a statute of limitations to a cause of action is justified by necessity and convenience. *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304 (1945). Application of statutes of limitation to otherwise permissible actions encourages promptness in the bringing of actions so that the parties shall not suffer by the loss of evidence from death or disappearance of witnesses, destruction of evidence, or failure of memory, and serves to spare courts from the litigation of stale claims. *Chase Securities Corp.* v. *Donaldson, supra; Missouri K. & T. R. Co.* v. *Harriman*, 227 U.S. 657 (1913); *Campbell* v. *Haverhill*, 155 U.S. 610, 617 (1895).

In view of this Court's keen awareness of the important role statutes of limitation play in the judicial process, the Court should appropriately find that those same policies which underlie the imposition of limitation periods in general require the application of appropriate state limitation periods to the EEOC's right to sue.

B. EEOC's Status As An Agency of the United States Should Not Preclude Application of a State Statute of Limitations To Its Right to Sue.

It is to be expected that, despite the considerable precedent in this Court and the lower federal courts supporting the principle that the most analogous state statute of limitations should be applied to those federal rights of action without their own limitation period, the Court will be urged by the EEOC to hold that state statutes of limitation do not run against the United States or its agencies. This argument is predicated upon a line of decisions by this Court involving suits by the United States in its sovereign capacity to collect monies owing to the United States Treasury, or to redress wrongs as to the United States itself or its property, in which the Court held that neither a state statute of limitations nor laches could be asserted against the United States or its agencies. *United States* v. *Thompson*, 98 U.S. 486 (1879) (United States sued to recover government funds for Indian affairs converted to personal use); *United States* v. *Nashville, Chattanooga & St. Louis Railway Co.*, 118 U.S. 120 (1886) (United States sued to collect interest payable on bonds which it owned); *Davis* v. *Corona Coal Co.*, 265 U.S. 219 (1924) (United States sued to recover for damages to property under its control); *United States* v. *Summerlin*, 310 U.S. 414 (1940) (United States sued to recover its claim against an estate).

There exists, however, an equally strong line of cases which hold that state statutes of limitation *are applicable* to actions by the United States where it has brought suit on behalf of private individuals who could have obtained a determination of their rights by their own action without participation of the United States. *United States* v. *Beebe*, 127 U.S. 338 (1888); *United States* v. *Des Moines Navigation & R.R. Co.*, 142 U.S. 510 (1892); *Curtner* v. *United States*, 149 U.S. 662 (1893). (In these cases

the United States brought suit on behalf of private individuals to cancel patents for land that had been fradulently obtained from the United States.)

Contrary to the anticipated assertion of the EEOC, the holding of *United States* v. *Beebe* and its progeny is not subject to distinction on the ground that in those cases the United States brought suit to serve only "private interests", while in the previously cited decisions of this Court finding the United States to be immune from statutes of limitation, the United States was suing to protect a "public interest" or promote public policy as does the EEOC when it brings suit pursuant to Section 706(f)(1). The fallacy of such an alleged distinction is fully demonstrated by this Court's decision in *Beebe*.

In *Beebe*, the Court noted that it was settled law that the United States was entitled to bring suit to enforce a right where it owes an obligation to the public to do so. 127 U.S. at 342; *United States* v. *San Jacinto Tin Co.*, 125 U.S. 273, 285-286 (1888); *United States* v. *American Bell Telephone Co.*, 128 U.S. 315, 366-367 (1888). Accordingly, in *Beebe*, this Court declined to overturn the circuit court's rejection of a demurrer to the Government's right to file a bill for annulment of a land patent on behalf of the rightful owners in that the suit fulfilled the Government's obligation to the public to prevent the fraudulent procurement of land patents. 127 U.S. at 343.

Yet, despite this finding that the Government's suit was clearly in the general public interest, the Court affirmed the circuit court's decision to sustain a demurrer to the bill on the ground that suit was barred by the applicable state statute of limitations and laches. The basis of the Court's latter holding was, as previously discussed, that the rights of those persons who principally stood to be benefitted by the Government's suit (the rightful holders of the patents) could have been determined in an action

brought by those persons without the participation of the United States.

> "The bill itself was filed in the name of the United States, and signed by the Attorney General on petition of private individuals. *And the right asserted is a private right, which might have been asserted without the intervention of the United States at all.*"

127 U.S. at 346 (emphasis added).

Thus, this Court's decisions fully support the conclusion that appropriate state statutes of limitation are applicable to suit by the United States or its agencies on behalf of private individuals, even where the action of the United States is arguably in the general public interest, if the private individuals could have obtained determination of their rights without the assistance of the United States.

C. The Ninth Circuit Erred in Refusing to Apply the Most Analogous State Statute of Limitations to the EEOC's Right to Sue.

The Ninth Circuit clearly erred in utilizing the above-discussed "public interest" versus "private interest" distinction in reaching its conclusion that the EEOC's right to sue for injunctive and monetary relief was interminable. Pursuant to Section 706(f)(1) of Title VII, after the passage of 180 days from the filing of a charge of employment discrimination, a charging party is legally empowered to seek on his own a determination of his rights under Title VII and, potentially, if he satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure, the rights of other similarly situated individuals. The legal rights of a charging party are not enhanced in any sense if they are pursued by the EEOC on his behalf rather than by the individual himself.

Thus it should be evident that, consistent with this Court's holding in *United States* v. *Beebe*, the fact the

EEOC can claim that by its prayer for injunctive relief in a suit brought pursuant to Section 706(f)(1) it seeks to promote public policy, should not be determinative of whether the EEOC's right to sue for injunctive relief on behalf of a charging party is subject to a state limitation period. By such a request the EEOC merely seeks to obtain for private individuals prospective protection of the rights to which they are entitled under Title VII. This same protection could be achieved in a suit by the private individuals themselves pursuant to Section 706(f)(1) without the assistance of the EEOC.

Likewise, the recent pronouncements by this Court in *Franks* v. *Bowman Transp. Co.*[15] and *Albemarle Paper Co.* v. *Moody*,[16] with regard to the connection between the recovery of backpay in Title VII actions and fulfillment of the public policy of eradicating employment discrimination, do not necessitate the conclusion that state limitation periods are inapplicable to suits by the EEOC for backpay under Section 706(f)(1). Those same pronouncements would equally support the conclusion that all suits pursuant to the Federal Civil Rights Laws for the recovery of backpay owing as a result of employment discrimination serve to promote fulfillment of the public policy of eradicating employment discrimination. Yet the obvious potential for furtherance of that public policy by a recovery of backpay did not deter this Court from finding that a suit by a private individual pursuant to 42 U.S.C. § 1981 to remedy alleged employment discrimination is subject to the most analogous state limitation period. *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975).

In the final analysis, a suit by the EEOC to recover backpay seeks to recover for private individuals, rather

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[15] —— U.S. ——, n. 40, 44 USLW 4356, 4365, n. 40 (1976).

[16] 422 U.S. 405, 417 (1975).

than for the United States Treasury, sums due them for violation of their rights under Title VII, even though the private individuals could have sought recovery of these sums without the assistance of the EEOC. Therefore, such a suit by the EEOC is essentially a private action [17] and the fact that the EEOC may somehow also be said to be promoting the public interest by bringing such a suit should not immunize its right to sue for such relief from application of a state limitation period.[18]

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[17] *EEOC* v. *Griffin Wheel*, 511 F.2d 456 (5th Cir. 1975). The Chamber, of course, fully supports the Fifth Circuit's conclusion in *Griffin Wheel* that the EEOC's right to sue to recover backpay on behalf of private individuals is subject to the most analogous state limitation period. assuming Section 706(f)(1) is not found to impose a 180 day federal limitation period on EEOC's right to sue. The Chamber submits, however, that the Fifth Circuit erred in not concluding that suit by the EEOC for injunctive relief pursuant to Section 706(f)(1) is also in the nature of a private action to obtain relief which principally benefits the individuals on behalf of whom EEOC brought suit, as opposed to the United States, and that, therefore, EEOC's right to sue for injunctive relief was equally subject to a state limitation period.

[18] This conclusion is not negated by the Ninth Circuit's contention that because the backpay provisions of Title VII are modeled after the National Labor Relations Act ("NLRA") and the right of the National Labor Relations Board ("NLRB") to obtain backpay under that Act has not been found to be subject to state limitation periods, the EEOC's right to sue should also not be limited. The asserted analogy is rendered totally unpersuasive by the substantial differences that exist between the way the rights provided by Title VII and the NLRA are enforced. The NLRB issues its own complaints which are adjudicated by its administrative law judges pursuant to the internal rules of the agency. State limitation periods have never been thought to be applicable to such administrative adjudications. In contrast, to enforce rights under Title VII pursuant to Section 706(f)(1), the EEOC must file a complaint in federal district court, a forum in which application of state law, including state limitation periods, is commonplace. Even more important, however, is the fact that pursuant to the NLRA, private individuals are not entitled to seek a determination of their rights under the Act. Instead they must depend on the NLRB to enforce their rights. Therefore, because a private individual on behalf of whom the NLRB seeks relief could not have his rights determined without the assistance of the NLRB, the

Accordingly, in that the bringing of a suit by the EEOC on behalf of private individuals seeking to obtain for them injunctive and monetary relief does not operate to alter the ultimate determination of the rights to which those individuals are entitled under Title VII, it follows that the Ninth Circuit should have concluded that the EEOC's right to sue was subject to a limitation period (*United States* v. *Beebe*, *supra*)[19] in the same manner as if the suit had been brought by the charging party alone. *Clayton* v. *McDonnell Douglas Corp.*, 419 F. Supp. 28 (C.D. Cal. 1976).[20] Consistent with the substantial precedent of this Court that in the absence of a federal limitation period as to a federal right of action an analogous state limitation period should be applied, *supra*, pp. 15-16, and mindful of this Court's statement in *Johnson* v. *Railway Express Agency, Inc.* that there is nothing "peculiar in a federal civil rights action which would justify special reluctance in applying state law",[21] the Ninth Circuit erred in not subjecting the EEOC's right to sue to the most analogous state limitation period provided by the law of the State of California.

NLRB's action would not fall within the exception to the immunity of suits by the United States or its agencies from state limitation periods created by *United States* v. *Beebe*, *supra*, even if the NLRB did initially pursue its actions for relief in the federal district courts.

[19] Indeed this result is even more compelling than that reached in the cases exemplified by *Beebe*, *supra*, in that Title VII so fully facilitates the private enforcement of rights by charging parties by providing for court appointed counsel, Section 706(f)(1), and the award of attorneys fees to the prevailing party, Section 706(K), thus serving to ensure that the rights afforded by Title VII do not go unenforced if the United States does not pursue them.

[20] The contrary statement of the district court in *Clayton* as to the EEOC's right to sue predicated on the Ninth Circuit's holding in this case would, of course, be invalidated if this Court accepts the foregoing argument.

[21] 421 U.S. at 462.

CONCLUSION

For the reasons set forth above, it is respectfully requested that this Court must conclude either that EEOC's right to sue pursuant to Section 706(f)(1) is subject to the 180 day limitation period found therein or the most analogous state limitation period.

Respectfully submitted,

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